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INTERNAL CORPORATE INVESTIGATIONS: LEGAL ETHICS, PROFESSIONALISM AND THE EMPLOYEE INTERVIEW

Sarah Helene Duggin*

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I. INTRODUCTION

The headlines abound: "Senior Officials Indicted," "CFO Pleads Guilty," "Employee Blows Whistle on Fraudulent Accounting Practices." It is difficult to pick up a newspaper today without reading of corporate scandal. From the spectacular financial debacles of Enron, WorldCom, and ImClone,[1] to Guidant Corporation's tragic failure to remove a defective medical device from the market,[2] corporate misconduct appears ubiquitous. As a result of growing public demand for accountability, a wave of criminal prosecutions and civil enforcement proceedings is surging

[1] *See, e.g.*, *Understanding Enron*, N.Y. TIMES, Jan. 25, 2002, at A2; Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry on Enron*, N.Y. TIMES, June 16, 2002, § 1, at 1.

[2] *See* David S. Hilzenrath, *Firm Silent as Patients Died; Device Maker Pleads Guilty to Misleading FDA*, WASH. POST, June 13, 2003, at A1; *Deadly Devices*, WASH. POST, June 18, 2003, at A24 (editorial criticizing $92 million in fines and requirement for implementation of corporate integrity measures as inadequate punishment for Guidant Corp.'s failure to report serious problems, including a number of deaths, allegedly caused by a device it manufactured and marketed to treat abdominal aortic aneurysms).

forward against business enterprises and their managers.[3] The passage of the Sarbanes-Oxley Act[4]—including provisions directing the Securities and Exchange Commission ("SEC") to promulgate rules requiring attorney disclosure of corporate misconduct[5]—ensures that this tide will continue to rise.

At some point, almost every organization encounters troubling questions of real or suspected wrongdoing by officers, directors, or employees. Sometimes there are few, if any, repercussions. On occasion, however, unfolding events reveal a pattern of wrongdoing so pervasive that it destroys the organization itself and leaves many of its principals

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[3] President George W. Bush appointed the Corporate Fraud Task Force in the summer of 2002. According to Attorney General John Ashcroft, the work of the Task Force during its first six months resulted in the initiation of more than 150 investigations by the United States Department of Justice ("DOJ"), the filing of criminal charges against 200 individuals, and the entry of sixty guilty pleas in federal criminal proceedings. Attorney General John Ashcroft, Remarks at United States Department of Justice Press Conference (Feb. 25, 2003) (announcing indictment of former Qwest officials) (transcript available at http://www.usdoj.gov/ag/speeches/2003/022503qwestpressconference.htm). This groundswell in criminal prosecutions of business organizations builds on momentum gathered in the 1990s. "In recent years, corporations and business organizations have been frequent targets of criminal investigations at both the state and federal levels. . . . The 1990s may well be remembered as the decade when traditional business practices came to be viewed with suspicion by law enforcement agencies." Benedict P. Kuehne, *Protecting the Privilege in the Corporate Setting: Conducting and Defending Internal Corporate Investigations*, 9 ST. THOMAS L. REV. 651, 652 (1997). Trends in criminal prosecutions and civil enforcement proceedings against corporations are discussed more fully *infra* Part II.B.

[4] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (to be codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) *See* Department of Justice Field Guidance on New Criminal Authorities Enacted in the Sarbanes-Oxley Act of 2002 (H.R. 3763) Concerning Corporate Fraud and Accountability (Aug. 1, 2002) (providing both a summary of key provisions and useful insights on the DOJ's view of the nature and prospective application of the criminal provisions of the act), *at* http://www.usdoj.gov/ag/readingroom/sarox1.htm; *see also infra* notes 74-86.

[5] Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C.A. § 7245 (West 2003).

facing criminal prosecution.[6] In an effort to help clients discover and deal with potentially serious misconduct, lawyers representing corporations routinely advise their clients to conduct internal investigations of suspected wrongdoing.[7] Prosecutors and government agencies have encouraged this trend,[8] and the highly publicized inquiries conducted by counsel retained by the boards of Enron, WorldCom and other major corporations[9] have made the term "internal investigation" common parlance. Consequently, the internal investigation has become a hallmark of corporate legal practice.[10]

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[6] *See, e.g.*, Press Release, United States Department of Justice, Former Enron Chief Financial Officer Andrew S. Fastow Charged with Fraud, Money Laundering, Conspiracy (Oct. 2, 2002), *at* http://www.usdoj.gov/opa/pr/2002/October/02_crm_568.htm; *Former Enron Exec Pleads Guilty, Agrees to Pay $12 Million*, 16 No. 10 WHITE-COLLAR CRIME REP. 1 (2002).

[7] Organizations undertake internal investigations in a wide variety of circumstances—e.g., determining the validity of allegations of criminal misconduct before government agents come to the door armed with search warrants; assessing the risks posed by an ongoing government investigation; dealing with potential environmental law infractions in time to avoid actual harm; or investigating an employee's claims of harassment prior to the institution of costly and disruptive litigation.

[8] *See infra* text accompanying notes 38-43 & 173-85.

[9] *See, e.g.*, Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp. (Feb. 1, 2002), *at* http://news.findlaw.com/hdocs/docs/enron/sicreport; Christopher Stern, *U.S. Seeks Delay in Publication of WorldCom Report*, WASH. POST, Mar. 13, 2003, at E02.

[10] Undertaking an internal investigation is not without significant risk, however. While investigation of specific allegations of misconduct or areas of known vulnerability paves the way for resolution of these problems, investigators may also uncover other potentially troubling situations that the corporation is not prepared to deal with immediately, or even provide a road map for subsequent probes by government agents. *See, e.g.*, Gabriel L. Imperato, *Internal Investigations, Government Investigations, Whistleblower Concerns: Techniques to Protect Your Healthcare Organization*, 51 ALA. L. REV. 205, 211 (1999); Joseph T. McLaughlin & J. Kevin McCarthy, *Corporate Internal Investigations—Legal Privileges and Ethical Issues in the Employment Law Context*, *in* CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 1998, at 991, 993 (Am. Law Inst.–Am. Bar Ass'n Course of Study, No. SD06, 1998).

An internal investigation is an inquiry conducted by, or on behalf of, an organization in an effort to discover salient facts pertaining to acts or omissions that may generate civil or criminal liability. Internal investigations are invaluable tools for addressing a wide variety of potential sources of corporate civil and criminal liability.[11] The employee interview is the heart of the internal investigation.[12] Documents, accounting ledgers, and other corporate records are important, but words and numbers come to life through the stories related by real people. Talking with those who have knowledge of key developments facilitates understanding of what happened and why better than any other investigative tool.

For many employees, participation in an internal investigative interview is simply one more work obligation. For others, the investigative interview may lead to discipline, dismissal, or even criminal charges. In the current law enforcement environment, there is a significant possibility that information provided by corporate constituents in the course of internal investigative interviews will be disclosed to prosecutors or other government agents. United States Department of Justice ("DOJ") policy encourages prosecutors to seek disclosure of the fruits of corporate internal investigations before deciding whether to file criminal charges against corporate defendants, enter into plea negotiations, or take positions with respect to sentencing.[13] "Voluntary" corporate disclosures often include material such as a lawyer's notes of employee interviews and communications with counsel that otherwise would be shielded by the corporation's attorney-client and work-product privileges.[14] At a time when the number of corporate prosecutions is rapidly increasing and

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[11] *See supra* note 7.

[12] *See, e.g.*, Kuehne, *supra* note 3, at 679-80 ("Interviews bring color to otherwise bland and sometimes boring documents."); Randall J. Turk, *The Interview Process*, *in* INTERNAL CORPORATE INVESTIGATIONS 89, 90 (Brad D. Brian et al. eds., 2d ed. 2002).

[13] *See infra* text accompanying notes 186-210.

[14] *See infra* text accompanying notes 135-69.

more than ninety percent of organizations charged with violating federal criminal laws plead guilty,[15] attorneys conducting internal investigations may well be gathering information likely to end up in the hands of the government. Yet, even sophisticated employees often fail to appreciate that corporate counsel may metamorphose into de facto government agents.

As a result of these circumstances, lawyers who conduct internal investigative interviews constantly confront the inherent tension between zealous representation of their corporate clients and fairness to corporate constituents. This tension gives rise to significant ethical issues for lawyers handling internal investigations for corporate clients, as well as for prosecutors who later seek to obtain the information these investigations uncover. For corporate counsel these dilemmas include: when and how to disclose to an interviewee that counsel represents the business entity, not the individual; what to say in response to questions such as "Do I need my own lawyer?"; and what to advise corporate clients with respect to government demands for privilege waivers, constituent requests for advancement of attorneys' fees, and related issues.

Ethical dilemmas also arise with respect to the conduct of prosecuting attorneys. A number of defense attorneys have raised concerns about federal government policies that effectively condition favorable treatment of corporate defendants on waiver of the attorney-client and work-product privileges and often encourage corporations to refuse continued employment, advancement of legal fees, and other support to their constituents.[16] The rules of professional responsibility in most jurisdictions address the questions raised by internal investigations and related questions only to a limited, and rarely adequate, extent.

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[15] *See* Kevin J. Cloherty et al., *10 Years of the Organizational Sentencing Guidelines: The Time Is Right for Review*, 16 No. 4 WHITE-COLLAR CRIME REP. 1 (2002) ("[N]early all cases involving corporate criminal defendants are resolved with guilty pleas . . . ."); *infra* text accompanying notes 174-75.

[16] *See infra* text accompanying notes 186-210.

During the last two years, both lawmakers and members of the legal profession have lavished attention on putting in place mechanisms to hold corporate actors accountable and to uncover corporate misconduct. Like Sarbanes-Oxley, the amendments to the American Bar Association Model Rules of Professional Conduct ("Model Rules") adopted by the House of Delegates of the American Bar Association ("ABA") in August of 2003[17] focus on attorney disclosure of corporate misconduct.[18] Like the earlier version, the amended Model Rules offer only limited guidance to corporate law practitioners about when and how to disclose the purpose and possible consequences of employee interviews to participants.

Ethical issues pertaining to internal investigations affect the lives and careers of corporate constituents ranging from line employees to chief executive officers. They also directly impact public perception of lawyers at a time when lawyers are already subject to widespread criticism that calls into question the integrity of the legal profession and exacts a toll on practitioners.[19] Consequently, it is imperative for the legal profession to address situations that threaten both public and personal perceptions of professional integrity.

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[17] *See* Press Release, American Bar Association, ABA Adopts New Lawyer Ethics Rules, Urges Fairness in Military Commission Trials (Aug. 12, 2003), *at* http://www.abanet.org/media/aug03/081203_1.html. The relevant resolutions are available at http://www.abanet.org/leadership/2003/journal/119b.pdf (last visited Oct. 22, 2003). The text of the amended rules is available at http://www.abanet.org/cpr/mrpc/new_rule1_6.pdf (last visited Oct. 22, 2003) and http://www.abanet.org/cpr/mrpc/new_rule 1_13.pdf (last visited Oct. 22, 2003).

[18] *See id.*

[19] One commentator suggests that the "foremost factor underlying the trend toward naming lawyers as defendants in lawsuits appears to be the failure of the professional responsibility guidelines to address problems of modern corporate law practice." George D. Reycraft, *Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel*, 39 HASTINGS L.J. 605, 607-08 (1988). Reycraft also observes, "Today, law firms are perceived to be more like businesses. As a result, the courts are beginning to treat law firms like other businesses and eliminating the aura of protection and trust that enveloped law firms in the past." *Id.* at 607.

This article addresses key ethical issues pertaining to the conduct of employee interviews in the course of internal corporate investigations. The discussion focuses on business corporations, but it is equally applicable to other for-profit and not-for-profit organizations.[20] Part II provides background information on developments in organizational criminal liability over the past two decades, the importance of the United States Sentencing Commission's *Organizational Sentencing Guidelines*, and the concomitant emergence of the internal investigation as an integral part of modern corporate legal practice. Part III examines law enforcement authorities' growing insistence on corporate "cooperation" as a prerequisite to participation in voluntary disclosure programs, avoidance of prosecution, and negotiation of guilty pleas. The principal rules of professional responsibility applicable to employee interviews, including changes in the Model Rules recently adopted by the ABA in the wake of Sarbanes-Oxley and the new SEC attorney conduct rules,[21] are discussed in Part IV. Part V looks at difficulties inherent in the application of current professional responsibility standards in the context of investigative employee interviews, and Part VI offers proposed principles for revision of standards applicable to

[20] National attention has focused principally on business corporations, but other entities have proved far from immune from the focus on institutions. Law partnerships, philanthropic organizations, and even universities have felt the sting of penalties under the Civil False Claims Act, 31 U.S.C. §§ 3729-3733 (2000), and other federal and state statutes. *See, e.g.*, M. William Salaganik, *Johns Hopkins Settles False Billings Case*, BALT. SUN, Feb. 15, 2003, at 10C. For the most part, similar kinds of considerations apply to any entity confronted with criminal or civil wrongdoing where that entity has a separate legal existence as an "artificial" or "juristic" person. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 1 (2003). These organizations include not-for-profit corporations, limited liability corporations, and in most states, limited partnerships, general partnerships, and a number of emerging forms of unincorporated business associations. *See* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 221-22 (5th ed. 2003).

[21] *See infra* note 86.

internal investigative interviews and related prosecutorial demands for corporate cooperation with law enforcement authorities. These basic principles are designed to promote both fairness to employees and professional integrity amid the rush to expose and prosecute corporate misconduct.

II. THE EMERGENCE OF THE INTERNAL INVESTIGATION IN RESPONSE TO EXPANSION OF CIVIL AND CRIMINAL PROCEEDINGS AGAINST CORPORATE DEFENDANTS

The DOJ currently espouses the view that "certain crimes that carry with them a substantial risk of great public harm . . . are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation."[22] Prior to the 1960s, however, criminal prosecution of major corporations and other entities was unusual;[23] even civil enforcement

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[22] U.S. DEP'T OF JUSTICE, *Federal Prosecution of Business Organizations, in* CRIMINAL RESOURCE MANUAL No. 162 (2003), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm (as amended by Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components, United States Attorneys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *at* http://www.usdoj.gov/ag/readingroom/sarox1.htm (last visited Oct. 22, 2003)).

[23] For a discussion of the bases of corporate criminal liability, see KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY (2d ed. 1992 & Supp. 2002); RICHARD STEPHEN GRUNER, CORPORATE CRIME AND SENTENCING §§ 2.1-.6, 3.1-.9 (1994 & Supp. 1995). The most commonly offered theory of liability is based on the tort concept of *respondeat superior*. As the United States Attorney's Manual instructs:

> Corporations are "legal persons," capable of suing and being sued, and of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties, and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the

proceedings rarely resulted in the severe penalties common today.[24] During the last two decades, however, both

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> corporation, as well as the responsible individuals, as potential criminal targets.

Federal Prosecution of Business Organizations, *supra* note 22, pt. I. *See also, e.g.*, Sean Bajkowski & Kimberly R. Thompson, *Corporate Criminal Liability,* 34 AM. CRIM L. REV. 445, 446 n.5, 448 (1997); 19 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5.10 (perm. ed., rev. vol. 2002); GRUNER, *supra*, §§ 3.31-.33; Molly E. Joseph, *Organizational Sentencing*, 35 AM. CRIM. L. REV. 1017, 1018-19 (1998). There is also an emerging notion that artificial persons, like natural persons, must control themselves in a manner that comports with civilized society and the behavioral rules by which it is governed. *See* Cloherty et al., *supra* note 15, at text preceding note 5. As Gruner points out, "[c]orporate criminal liability ties the interests of the public in lawful corporate conduct to the financial well-being of each firm." GRUNER, *supra*, § 1.1. Subjecting corporations to criminal liability is an effective public policy tool, because the possibility of criminal sanctions

> forces corporate managers to pay attention to law compliance amidst economic forces and the crush of other affairs that might otherwise cause them to ignore compliance defects in corporate operations. Even if corporate managers have not caused these defects, corporate criminal liability insures that these managers have reasons to exert themselves to recognize illegal defects in corporate conduct and to react with preventive improvements in corporate operations.

Id.

[24] The Supreme Court first upheld the criminal prosecution of a corporation under the Sherman Act, 15 U.S.C. §§ 1-7 (2000) in 1909 in *New York Cent. & Hudson R.R. Co. v. United States*, 212 U.S. 481, 494-95 (1909). 10 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4942 n.18 (perm. ed., rev. vol. 2002). In 1890, violations of the Sherman Act constituted misdemeanors punishable by a fine of up to $5000. Congress increased the monetary penalty to $50,000 in 1955, and provided for felony prosecution of specific categories of violations in 1974. In 1974, Congress also amended federal securities laws to make specified violations into felonies. *Id.* Subsequent amendments increased penalties for convicted corporations in a number of areas. *See, e.g.*, Criminal Fines Improvement Act of 1987 § 6, Pub. L. No.

significant civil enforcement proceedings and criminal prosecutions of companies and individual officers, directors and employees have become commonplace. In the 1960s, the SEC led the way in the civil enforcement arena with its pursuit of significant civil sanctions against violators of the federal securities laws.[25] Other federal agencies soon followed the SEC's lead.[26] By the mid 1970s, Congress, too, joined in by legislatively increasing the sanctions for a number of criminal and civil offenses applicable to corporate entities and their officers, directors and employees.[27]

In the early 1980s, federal prosecutors became increasingly interested in corporate misconduct, and federal agencies began to move in the direction of prosecuting both entities and their constituents as a means of holding corporate decision makers accountable.[28] As the stakes rose, more corporations began to initiate internal investigations of potential legal problems in an effort to identify and address

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100-185, 101 Stat. 1279, 1280 (codified as amended at 18 U.S.C. § 3571(c)(5) (2000)). In Sarbanes-Oxley, Congress increased penalties for violations of a number of federal laws, Sarbanes-Oxley Act, *supra* note 4, §§ 805, 901-904, and directed the United States Sentencing Commission ("USSC") to review the guidelines for sentencing pursuant to these statutes. Sarbanes-Oxley Act, *supra* note 4, §§ 805, 905, 1104. Pursuant to Sarbanes-Oxley and its general authority under 28 U.S.C. § 994 (2000), the USSC promulgated temporary emergency amendments to the sentencing guidelines earlier this year. The text of these amendments is available at http://www.ussc.gov/FEDREG/fedr0103b.htm (last visited Oct. 20, 2003).

[25] *See, e.g.*, Arthur F. Mathews, *Internal Corporate Investigations*, 45 OHIO STATE L.J. 655, 655-56 (1984).

[26] *See* BRICKEY, *supra* note 23, § 1:01; STEPHEN F. BLACK, INTERNAL CORPORATE INVESTIGATIONS § 1.01, at 1-1 (1998).

[27] *See* BRICKEY, *supra* note 23, § 1:02.

[28] *Id.* For example, in 1981, the DOJ created the Environmental Enforcement Section as a branch of the Natural Resources Division, and the United States Environmental Protection Agency established an Office of Criminal Enforcement. *Id.*; *see also* Nancy K. Kubasek et al., *The Role of Criminal Enforcement in Attaining Environmental Compliance in the United States and Abroad*, 7 U. BALT. J. ENVTL. L. 122, 122-23 (2000).

issues before they became the focus of government inquiries.[29]

A. The Development of the Internal Investigation as a Defensive Tool

During this same time period, the concept of corporate responsibility for individual misconduct that benefited the organization began to crystallize.[30] For many years, corporate managers had little reason to fear criminal or civil sanctions for either themselves or the entities they managed.[31] In the 1970s, however, the SEC aggressively pursued civil enforcement proceedings against corporations involved in making questionable payments to foreign officials, and law enforcement authorities began to scrutinize the conduct of corporations and their managers to a greater extent than ever before. The SEC, in particular, sought to put in place measures to permit thorough investigation of corporate activities in a variety of areas.[32] For example, in negotiating consent decrees, the SEC began to seek new

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[29] In some instances prosecutors have moved aggressively against lawyers representing corporations, as well as the entities and their constituents. *See generally* Corey D. Babington, Note, *Preserving the Attorney-Client Privilege After* United States v. Anderson, 49 U. KAN. L. REV. 221 (2000); Joel Cohen & Norman Bloch, *Can Lawyers Be Prosecuted for the Advice They Give*?, 206 N.Y. L.J. 1 (1991); Stuart M. Gerson & Jennifer E. Gladieux, *Advice of Counsel: Eroding Confidentiality in Federal Health Care Law,* 51 ALA. L. REV. 163, 195 (1999).

[30] *See generally* BRICKEY, *supra* note 23, § 4.02.

[31] For example, prior to the early 1980s, "corporate officers and managers [were not] concerned about going to jail" for violation of federal environmental laws. Kubasek et al., *supra* note 28, at 123.

[32] *See, e.g.*, BLACK, *supra* note 26, at 1-1. For a summary of developments with respect to SEC enforcement actions pertaining to insider trading, political slush funds, foreign payments and executive perquisites, see Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act Release No. 15,570, 44 Fed. Reg. 10970 (Feb. 15, 1979) and see also, Mathews, *supra* note 25, at 662-65.

kinds of remedies for corporate securities law violations.[33] These measures included provisions for the addition of new, independent corporate directors charged with pursuing "internal corporate special investigations,"[34] engagement of special counsel and auditors to review and report on particular businesses and practices,[35] and court-supervised appointment of independent counsel to conduct investigations.[36] In several instances, the DOJ's Office of the Special Prosecutor also initiated criminal charges against corporations and senior executives.[37] By the height of the Watergate Era in the mid 1970s, it became apparent that, in addition to the foreign payment morass, senior managers of many major corporations were entangled in a web of illegal political campaign contributions in the United States.[38] Recognizing that its own resources were limited and concluding that "in most cases the public interest could be served adequately by disclosure and cessation of the derelictions, without additional sanctions against the reporting company or its employees,"[39] the SEC began to encourage corporations to conduct their own investigations into questionable foreign payments, illegal campaign

[33] *See generally* Mathews, *supra* note 25, at 656-57; George W. Dent, Jr., *Ancillary Remedies in Federal Securities Law: A Study in Federal Remedies*, 67 MINN. L. REV. 865 (1983); James R. Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 HARV. L. REV. 1779 (1976); Comment, *Equitable Remedies in SEC Enforcement Actions*, 123 U. PA. L. REV. 1188 (1975). For a review of current remedy provisions, see LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3D ch.13 (2001).

[34] Mathews, *supra* note 25, at 658-63.

[35] *Id.* at 660-62.

[36] *Id.* at 662.

[37] *The International Anti-Bribery and Fair Competition Act of 1998: Hearing on H.R. 4353 Before the House Subcommittee on Finance and Hazardous Materials, Committee on Commerce*, 105th Cong. 2-3 (1998) (statement of Paul V. Gerlach, Associate Director, Division of Enforcement, Securities and Exchange Comm'n) [hereinafter Gerlach Testimony].

[38] BLACK, *supra* note 26, at A-1; Mathews, *supra* note 25, at 662-64.

[39] BLACK, *supra* note 26, at 1-1.

contributions, and other corporate misconduct.[40] The agency offered leniency to companies that came forward to report infractions.[41] The SEC soon formalized a voluntary disclosure program that relied to a large extent on corporations' willingness to undertake internal investigations.[42] During the 1970s, more than four hundred United States corporations, including one hundred seventeen Fortune 500 companies, participated in the SEC's voluntary disclosure program.[43]

The SEC's actions, Internal Revenue Service ("IRS") investigations of improper business deductions for illegal foreign payments and domestic contributions,[44] the passage of the Foreign Corrupt Practices Act in 1977,[45] and the mushrooming political fall-out of the Watergate scandal,[46] caused federal law enforcement authorities to delve into realms of activities once perceived solely as internal corporate affairs. As the scope of government inquiry into business conduct continued to expand, a number of American companies initiated internal investigations on their own in the hope of uncovering problems and staving off prosecution

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[40] *See* Mathews, *supra* note 25, at 662-65.

[41] BLACK, *supra* note 26, at 1-2.

[42] Mathews, *supra* note 25, at 666-71.

[43] Gerlach Testimony, *supra* note 37, at 3.

[44] BLACK, *supra* note 26, at 1-1.

[45] Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78(m)(b)(2)-(3), 78dd-1-2 (2000)). In addition, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (2000), while originally enacted to address problems posed by organized crime, became another tool used by prosecutors against otherwise ordinary corporations and their officers and directors. *See, e.g.*, FLETCHER ET AL., *supra* note 23, § 5.12.

[46] The Watergate scandal had a profound impact on perceptions of corporate America. "One impetus for the expanding criminal prosecutions of corporations was the revelation in the Watergate period that a number of corporations had engaged in questionable political payments which had the potential for corrupting political institutions in the United States and abroad." FLETCHER ET AL., *supra* note 23, § 5.12.

through voluntary disclosure and remedial action.[47] As the practice expanded and yielded favorable results, lawyers representing corporations vulnerable to government scrutiny began to view the internal investigation as an important defensive tool.[48]

B. The Expansion of Corporate Criminal Prosecutions and the Impact of the *Organizational Sentencing Guidelines*

By the 1980s, prosecutors and regulatory agencies across the country were setting their sights on corporations. Defense contract scandals and the savings and loan crisis followed on the heels of the foreign payment and domestic political contribution controversies.[49] By 1984, when Congress created the United States Sentencing Commission in an effort to unify penal policies and minimize sentencing disparities,[50] a major change was underway. At that time,

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[47] An internal investigation and subsequent disclosure of questionable payments to foreign government officials led to the Supreme Court's landmark decision on the availability of the attorney-client and work-product privileges to corporations in the context of an internal investigation in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *See infra* text accompanying notes 135-40.

[48] Mathews, *supra* note 25, at 666. By the late 1980s and early 1990s a number of commentators began to recommend internal investigations as a defensive tool. *See, e.g.*, Judah Best, *A White Collar Defense Primer: An Overview of Internal Corporate Investigations, Grand Jury Investigations and Parallel Proceedings, with Emphasis on Problems of Former Adjudication, Attorney-Client Privilege, Multiple Representation and Prosecutorial Misconduct*, *in* LITIGATION FOR THE NON-LITIGATOR: THE ROLE OF THE CORPORATE LAWYER IN THE LITIGATION PROCESS, at 549 (PLI Corporate Law & Practice Course, Handbook Series No. 584, 1987); Robert S. Bennett et al., *The Role of Internal Investigations in Defending Against Charges of Corporate Misconduct*, *in* HOW TO HANDLE INTERNAL INVESTIGATIONS AND ESTABLISH SUCCESSFUL COMPLIANCE PROGRAMS, at 31 (PLI Corporate Law & Practice Course, Handbook Series No. 763, 1992).

[49] BRICKEY, *supra* note 23, §§ 1:01-:02; *see also* BLACK, *supra* note 26, at 1-2.

[50] Congress created the United States Sentencing Commission in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217, 98 Stat. 1987, 2017-26 (codified as amended at 28 U.S.C. §§ 991-998 (2000)). *See*

most federal prosecutions of corporations involved small, closely held companies.[51] By the end of the decade, however, the annual number of prosecutions of publicly traded corporations had increased dramatically,[52] and cases were receiving a great deal of media attention.[53]

On November 1, 1991, as the number of significant corporate criminal prosecutions continued to grow, the United States Sentencing Commission's *Organizational Sentencing Guidelines* entered into effect.[54] Pursuant to the *Organizational Sentencing Guidelines,* entities, like individuals, are sentenced on the basis of a "culpability score" reflecting the nature and extent of the harm resulting from the offense and the accused's prior record with respect to criminal transgressions and other misconduct.[55] For

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generally U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A & ch. 8 (2002) (containing the chapters entitled Introduction and Sentencing of Organizations), *available at* http://www.ussc.gov/2002guid/tabcon02_2.htm (last visited Oct. 21, 2003); 2001 U.S. SENTENCING COMM'N ANN. REP. 1, *at* http://www.ussc.gov/ANNRPT/2001/ar01toc.htm (last visited Nov. 20, 2003). The Commission has seven voting members who are appointed by the President, with the advice and consent of the Senate, for six-year terms. Three of the members are federal judges, and no more than four may belong to the same political party. The Attorney General and the chairman of the United States Parole Commission are ex officio members. *Id.* at 2.

[51] Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-90*, 71 B.U. L. REV. 247, 251 (1991).

[52] *Id.* at 252.

[53] *See id.* at 252 n.12.

[54] Stephen S. Cowen, *Federal Guidelines for Sentencing Organizations and the Role of Compliance Programs*, *in* CORPORATE COMPLIANCE 2000, at 43, 47 (PLI Corporate Law & Practice, Handbook Series No. 1177, 2000). The primary objectives of the *Organizational Sentencing Guidelines* were two-fold: to create uniformity in the sentencing of entities parallel to the objectives the *Guidelines* were intended to achieve with respect to individual offenders, and to promote "just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct." U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt (2002).

[55] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2002). *See generally* Cowen, *supra* note 54.

organizations, other considerations factored into the score include "involvement in or tolerance of the criminal activity"[56] (a severity factor that increases with the size of the organization and the level of the person or persons involved in the misconduct),[57] and evidence of obstruction of justice or encouragement of obstructive practices.[58] An organization may lower its culpability score—and thereby decrease the severity of its sentence—by showing that, at the time the offense occurred, the entity had in place an "effective program to prevent and detect violations of the law,"[59] or by demonstrating "[s]elf-reporting, cooperation, and acceptance of responsibility" for the organization's wrongful conduct.[60]

The *Organizational Sentencing Guidelines* were designed to work in tandem with the provisions applicable to individuals,[61] to cover the broad range of organizational offenses with which federal prosecutors began to charge corporate defendants during the 1990s.[62] In 1995, the federal courts sentenced 111 organizational defendants under the *Guidelines*,[63] although 96% were still closely held corporations.[64] Courts imposed criminal fines as sanctions in approximately 78% of the cases.[65] The mean fine was $242,892, and the median was $30,000.[66] By 2000, 304

[56] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(b) (2002).

[57] *Id.*

[58] *Id.* § 8C2.5(e).

[59] *Id.* § 8C2.5(f).

[60] *Id.* § 8C2.5(g).

[61] *Id.* at ch. 8, introductory cmt.

[62] As the United States Sentencing Commission reported in 1995, for several years after the Guidelines entered into effect, the federal courts continued to impose sentences that were not subject to the guidelines because the actual indictments predated the effective date of the Guidelines for the particular offenses charged. 1995 U.S. SENTENCING COMM'N ANN. REP. 120-22, http://www.ussc.gov/ANNRPT/1995/ch5_95.pdf (last visited Oct. 21, 2003).

[63] *Id.* at 121.

[64] *Id.*

[65] *Id.* at 124.

[66] *Id.* at 124-25.

organizations received sentences under the *Guidelines*, 19.2% more than in 1999 and 38.2 % more than in 1998.[67] Of these companies, 87.5% pled guilty.[68] The highest fine reached $53 million, and the mean was $2,316,732,[69] nearly ten times the mean fine in 1995. In 2001, the number of organizations sentenced dropped to 238, a 21.7% decrease from 2000,[70] but the incidence of guilty pleas increased to 92.4%.[71] The overall mean for fines was comparable to that of the preceding year at $2,154,929, with a mean of $3,399,151 for offenses subject to section 8C2.1.[72] The three largest financial sanctions were fines of $134 million and $53 million in antitrust cases and $50.1 million in a fraud case.[73] Since the establishment of the federal Corporate Fraud Task Force in mid 2002, the number of investigations and indictments of major corporations and corporate constituents appears to be climbing at an even faster rate.[74]

The financial debacles and other corporate scandals of the last few years have added dramatic impetus to the push for prosecution of corporate offenders.[75] Sarbanes-Oxley[76]

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[67] 2000 U.S. SENTENCING COMM'N ANN. REP. 45, http://www.ussc.gov/ANNRPT/2000/Ar00chap5.pdf (last visited Oct. 21, 2003).

[68] *Id.*

[69] *Id.* at 47.

[70] *Id.*; 2001 U.S. SENTENCING COMM'N ANN. REP. 48, http://www.ussc.gov/ANNRPT/2001/ch5-2001.pdf (last visited Oct. 21, 2003).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See, e.g.*, *supra* note 3, text accompanying notes 3-5, and *infra* notes 174-85.

[75] For a discussion of the reasons for the financial debacles of the past eighteen months, as well as insights into the creation of "a culture ripe for corporate fraud," see William S. Duffey, Jr., *Corporate Fraud and Accountability: A Primer on Sarbanes-Oxley Act of 2002*, 54 S.C. L. REV. 405 (2002). For examples of criminal prosecutions, see *supra* note 3; *Former Enron Exec Pleads Guilty, Agrees to Pay $12 Million*, *supra* note 6 (quoting SEC Enforcement Division Director Stephen Cutler to the effect that the Kopper prosecution "is the first in what we anticipate to be a series of actions . . . to make sure that all those responsible [for the Enron debacle] answer for their misdeeds."); *Three Plead Guilty to $24 Million*

reflects the current enforcement climate: legislators, law enforcement authorities, and the public are united in demanding greater corporate accountability.[77] The new law

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Tax Fraud Involving Import of Chemicals, 16 No. 4 WHITE-COLLAR CRIME REP. 1 (2002); *Fla. Brokerage's Two Top Officers Indicted for Multimillion-Dollar Fraud*, 16 No. 7 WHITE-COLLAR CRIME REP. 1 (2002); *Adelphia Execs Indicted in $2 Billion Fraud Scheme*, 16 No.11 WHITE-COLLAR CRIME REP. 1 (2002); *Louisiana-Pacific Enters Guilty Pleas*, WASH. POST, May 30, 1998, at G06 (reporting corporation's entry of guilty plea and payment of $37 million fine for violation of Clean Air Act.); Press Release, U.S. Dep't of Justice, TAP Pharmaceutical Products, Inc. and Seven Others Charged with Health Care Crimes; Company Agrees to Pay $875 Million to Settle Charges (Oct. 3, 2001), *at* http://www.usdoj.gov/opa/pr/2001/October/513civ.htm. For examples of major civil enforcement proceedings and accompanying sanctions, see Charles Gasparino, *Time to Clean Up Those Files*, WALL ST. J., Feb. 28, 2003, at A1 (reporting agreement of Credit Suisse First Boston to pay civil settlements totaling hundreds of millions of dollars); Jeff Gerth, *2 Companies Pay Penalties for Improving China Rockets*, N.Y. TIMES, March 6, 2003, at A9 (reporting that Hughes Electronics Corporation and Boeing Satellite Systems agreed to pay $32 million in civil penalties in connection with technology transfers to China, while Lockheed Martin and Loral Space and Communications Corporation paid $13 and $20 million respectively to settle "similar cases."); Kurt Eichenwald, *Hospital Company Agrees to Pay $745 Million on U.S. Fraud Case*, N.Y. TIMES, May 19, 2000, at A1; David Cay Johnston, *A.A.R.P. Sets Up a Taxable Subsidiary*, N.Y. TIMES, July 15, 1999, at C9 (reporting on American Association of Retired Persons' agreement to resolve dispute with Internal Revenue Service through annual payments of $15 million).

[76] Sarbanes-Oxley Act, *supra* note 4.

[77] This convergence of interests is likely to keep the number of corporate criminal prosecutions elevated for some time to come. *See generally* William S. Duffey, Jr., *Corporate Fraud and Accountability: A Primer on Sarbanes-Oxley Act of 2002*, 54 S.C. L. REV. 405 (2002). As Duffey points out, "Sarbanes-Oxley in many respects imposes what responsible corporate executives have urged in the past—honesty in financial disclosures, management accountability for the financial affairs of the corporation, and avoidance of personal financial interest or conflict in decision-making by corporate executives." *Id.* at 406. Simply put, "[s]enior management is expected to know how the corporation earns its income and what risks the corporation is undertaking in the course of carrying out its business. Management should never put personal interests ahead of or in conflict with the interests of the corporation." THE BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE iii (2002) (quoting Duffey, *supra*, at 406).

imposes a number of measures designed to enhance corporate honesty and accountability. It imposes individual responsibility for financial statement certification on corporate chief executive and chief financial officers,[78] expands whistleblower protections,[79] and creates new obstruction-of-justice crimes relating to destruction of or tampering with corporate records.[80] It also increases criminal penalties under several federal criminal statutes, including the mail and wire fraud statutes,[81] the Employee Retirement Income Security Act of 1974,[82] and the Securities

[78] Sarbanes-Oxley Act, *supra* note 4.

[79] *See id.* § 806.

[80] *Id.* §§ 802, 1102. These new provisions amend 18 U.S.C. § 1512 and add 18 U.S.C. §§ 1519 & 1520. They augment pre-existing obstruction-of-justice provisions. *See, e.g.*, 18 U.S.C. §§ 1505, 1516-1518 (2000). In addition to the criminal statutes, ethical rules also bar lawyers from engaging in destruction, concealment or alteration of documents or other evidence. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2003).

[81] 18 U.S.C. § 1341 (2000 & Supp. 2002) (mail fraud) & 18 U.S.C. § 1343 (2000 & Supp. 2002) (wire fraud). For review and analysis of the criminal provisions of the Sarbanes-Oxley legislation, see John J. Falway & Matthew A. Wolfman, *The Criminal Provisions of For a Sarbanes-Oxley: A Tale of Sound and Fury,* 16 No. 11 WHITE-COLLAR CRIME REP. 1 (2002). As the authors state, "there can be no question that, post-Sarbanes-Oxley, we have begun to and will continue to see a huge enforcement push directed at securities and other corporate crime." *Id.* Section 807 of the Act adds a catch-all securities fraud offense, 18 U.S.C. § 1348 (2000 & Supp. 2002); section 302 requires certification of financial statements by a corporation's chief executive officer ("CEO") and chief financial officer ("CFO") with criminal penalties for false certifications, 18 U.S.C. § 1350; section 802 amends an existing obstruction-of-justice provision, 18 U.S.C. § 1512, and creates two new obstruction-of-justice provisions applicable to document destruction, 18 U.S.C. §§ 1519 & 1520; section 806 adds a private cause of action, for retaliation against corporate whistleblowers to existing criminal law provisions, 18 U.S.C. § 1514A; sections 902 through 906 and section 1106 increase the penalties for a number of existing white-collar crimes, 18 U.S.C. §§ 1341, 1343, 1349; 29 U.S.C. § 1131; and section 905 requires the United States Sentencing Commission to review guidelines applicable to specified corporate crimes, 28 U.S.C. § 994. *See, e.g.*, Duffey, *supra* note 77.

[82] Sarbanes-Oxley Act, *supra* note 4, § 904. Violations of ERISA are now punishable by fines of up to $100,000 in fines for individuals and $500,000 for organizations. *Id.*

Exchange Act of 1934.[83] Pursuant to the requirements of Sarbanes-Oxley and emergency authority provided by the statute,[84] the United States Sentencing Commission ("USSC") recently amended federal sentencing guidelines for fraud-related offenses, obstruction of justice and related offenses to increase sanctions.[85] The SEC has also promulgated new rules governing attorney disclosure of corporate misconduct.[86]

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[83] Sarbanes-Oxley Act, *supra* note 4, § 804.

[84] Sarbanes-Oxley Act, *supra* note 4, § 805, 905 & 1104.

[85] *See* U.S. SENTENCING GUIDELINES MANUAL SUPPLEMENT (effective Jan. 25, 2003), *at* http://www.ussc.gov/2002suppa/2002supp.pdf (last visited Oct. 22, 2003).

[86] Section 307 of Sarbanes-Oxley, 15 U.S.C. § 7245, directed the SEC, within 180 days of the law's enactment, to issue rules "setting forth minimum standards of professional conduct for attorneys appearing before the Commission in any way in the representation of issuers." The statute instructed the Commission to promulgate rules requiring attorneys to report material violations of securities laws, breaches of fiduciary duty, or other legal violations by the company or any of its agents to the chief legal officer and/or chief executive officer of the company, and, in the event of a failure to respond appropriately, to report the matter to the audit committee or other relevant committee of the company's board. *Id.* The SEC issued a final rule pursuant to the statutory mandate on January 23, 2003. The Commission also voted to propose a rule requiring issuers to publicly disclose withdrawal of counsel or written notice of the absence of an appropriate response to a report of a material violation. *Id. See* Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 (2003); Final Rule: Implementation of Standards of Professional Conduct for Attorneys, *at* http://www.sec.gov/rules/final/33-8185.htm (modified Sept. 26, 2003). For a summary of the rules the SEC has promulgated to date pursuant to Sarbanes-Oxley, see the SEC's *Spotlight on Sarbanes-Oxley Rulemaking and Reports*, *at* http://www.sec.gov/spotlight/sarbanes-oxley.htm (last visited Oct. 22, 2003). The American Bar Association and many other professional bodies have hotly debated, and continue to debate, the new attorney conduct rules and related proposals. *See, e.g.*, *Attorneys Call for Delay, More Discussion of SEC Rule Proposals on Noisy Withdrawal*, 71 U.S.L.W. 2407 (2002); *ABA Panelists Assess How Sarbanes-Oxley SEC Rules Will Change Practice and Ethics*, 71 U.S.L.W. 2526 (2003). For a discussion of relevant ethical issues, see Michael L. Fox, *To Tell or Not to Tell: Legal Ethics and Disclosure After Enron*, 2002 COLUM. BUS. L. REV. 867; Larry P. Scriggins, *Legal Ethics, Confidentiality,*

C. Spiraling Civil Liability and Other Consequences of Corporate Misconduct

Along with increasing risk of criminal prosecution, corporate defendants also are facing staggering potential civil liability on a variety of fronts. Both government-initiated actions and whistleblower lawsuits pursuant to the Civil False Claims Act[87] impose huge financial burdens on corporations and other entities because of the statute's extraordinary penalty provisions.[88] A number of highly publicized settlements have ranged in the tens of millions of dollars, and some have involved hundreds of millions.[89]

Shareholder derivative suits pose another particularly troublesome liability risk for corporate defendants.[90] The Delaware Chancery Court's landmark decision in *In re*

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and the Organizational Client, 58 BUS. L. REV. 123 (2002); Thomas H. Watkins, *Ethics: Are Lawyers the Last Line of Defense for Critical Accounting Issues Under Sarbanes-Oxley?*, *in* 23RD ANNUAL INSTITUTE ON COMPUTER LAW, at 531 (PLI Patents, Copyrights, Trademarks & Literary Property Course, Handbook Series No. 735, 2003); Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 144 (2002) ("The Enron affair and the flood of other recent corporate scandals (e.g., Adelphia, Arthur Andersen, . . . Dynergy, Global Crossing, Tyco, WorldCom, Xerox) have led to a loss of investor and public confidence in the integrity of the securities and other markets that make American capitalism work.").

[87] 31 U.S.C. § 3729 (2000).

[88] The Civil False Claims Act provides for treble damages and mandatory fines ranging from a minimum of $5,000 to a maximum of $10,000.00 per claim. 31 U.S.C. § 3729 (2000).

[89] *See, e.g.*, *In re* Caremark Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996). *See generally* Press Release, U.S. Dep't of Justice, Justice Dept. Civil Fraud Recoveries Total $2.1 Billion for FY 2003; False Claims Act Recoveries Exceed $12 Billion Since 1986 (Nov. 10, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm.

[90] *See* Dennis J. Block & Nancy E. Barton, *Internal Corporate Investigations: Implications of the Attorney-Client Privilege and Work-Product Doctrine*, *in* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 12, at 85; Anitha Reddy, *BearingPoint Is Sued by Its Shareholders; Class Actions Part of Broader Trend, Study Finds*, WASH. POST, Sept. 12, 2003, at E05; *see generally*, Mathews, *supra* note 25, at 673.

Caremark, Inc.[91] held that corporate directors have a fiduciary duty to establish monitoring systems to prevent, and when necessary correct, criminal misconduct on the part of corporate employees and agents.[92] The court upheld settlement of the action for minimal monetary payment on grounds that Caremark's directors had taken steps to fulfill the duty of care to ensure corporate adherence to applicable law.[93] The court's conclusion that Caremark's directors had met their obligations was somewhat surprising given the extraordinarily pervasive wrongdoing.[94] Even so, the case is significant because it established the potential liability of corporate directors for failing to monitor their organizations' compliance with legal obligations[95] in the jurisdiction that is home to many of the largest and most influential American businesses corporations. Recognition of directors' responsibility for legal compliance paved the way for subsequent shareholder derivative actions alleging breach of fiduciary duty in the wake of criminal and civil enforcement proceedings against corporations.[96] At present, managers of any public company convicted of a significant criminal offense or sanctioned in a major civil enforcement proceeding must anticipate subsequent shareholder derivative litigation.

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[91] 698 A.2d 959 (Del. Ch. 1996).

[92] *Id.* at 970.

[93] *Id.* at 971-72.

[94] A number of Caremark facilities were implicated in the wrongdoing, and the company paid more than $250 million to resolve related matters. *Id.* at 960-61.

[95] *See* 698 A.2d at 970. *See also, e.g., In re* Abbott Laboratories Shareholder Derivative Litigation, 325 F. 3d 795, 808 (7th Cir. 2003); McCall v. Averhoff, 239 F.2d 808, 817 (2nd Cir. 1956), *amended on denial of rehearing*; McCall v. Scott, 250 F.3d 497 (6th Cir. 2001). *See generally* Carole Basri & Irving Kagan, *The Caremark Case and Directors' Duty to Establish Compliance Programs, in* CORPORATE LEGAL DEPARTMENTS §§ 16:4, 16:8 (2002); AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 cmt. (1994) [hereinafter PRINCIPLES OF CORPORATE GOVERNANCE]; MODEL BUS. CORP. ACT § 8.31 cmt. (f) (1984).

[96] *See* Reddy, *supra* note 90.

Debarment—exclusion from eligibility for government contracts—is yet another serious financial risk for corporations that arises in connection with criminal and some kinds of civil liability.[97] For companies that rely on government contracts for all or a significant percentage of their business, debarment can be a fatal sanction. Similarly, while companies that are not government contractors do not face debarment, corporations convicted of criminal offenses or subjected to significant civil penalties or settlements under statutes such as the False Claims Act,[98] stand to pay a high price in the marketplace as a result of both business losses and potentially devastating stock devaluations when allegations of misconduct become public.[99] At the same time, these events are enormously disruptive to the company's ongoing business. They distract managers and employees alike from both daily operations and long-range planning. They also demand extraordinary resources, particularly from senior managers, even though corporate managers may have had nothing to do with the alleged misconduct.

Companies facing criminal liability or serious civil sanctions are also likely to incur enormous legal bills in connection with their defense and the implementation of measures to remedy the problems that led to the underlying legal difficulties.[100] Finally, individual officers, directors, employees, agents, and other corporate constituents implicated in misconduct face consequences ranging from monetary sanctions to loss of career and livelihood, and even imprisonment.[101]

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[97] The causes for debarment and related procedures for government contractors are set forth in the Federal Acquisition Regulations, 48 C.F.R. § 9.406-2 (2003).

[98] 31 U.S.C. §§ 3724-33 (2000).

[99] *See, e.g.*, Cohen, *supra* note 51, at 266-67.

[100] *See, e.g.*, Dennis K. Berman, *Qwest Is Spending Top Dollar to Defend Accounting Practices*, WALL ST. J., March 10, 2003, at C1.

[101] *See supra* note 75.

D. The Importance of the Internal Investigation in Modern Corporate Legal Practice

The rapid rise in the incidence of criminal prosecution of major corporations, the implementation of the USSC's *Organizational Sentencing Guidelines*, the expanding bases of corporate civil liability, and the current national focus on curbing "corporate greed"[102] have created compelling incentives for organizations to act promptly to discover and correct acts and omissions that pose significant liability risks. The internal investigation is the tool that permits them to do so. The circumstances that prompt internal investigations are myriad: evidence of irregular stock trades, allegations of illegal employment discrimination, the results of an internal audit, an anonymous tip about billing irregularities, a civil suit, the sudden departure of a key employee, an inquiry or site inspection by regulatory agency personnel, a customer complaint, a civil investigative demand, a grand jury subpoena, or any of a vast assortment of other reasons.[103] Internal investigations often are undertaken when corporate officials learn of pending investigations or legal actions instituted against the company and seek to evaluate risk, correct systemic problems, or take action to mitigate legal exposure for the

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[102] In the words of Federal Reserve Chairman Alan Greenspan, we are suffering the effects of a corporate culture of "infectious greed." Richard W. Stevenson & Richard A. Oppel, Jr., *Fed Chief Blames Corporate Greed; House Revises Bill*, N.Y. TIMES, July 17, 2002, at A1. The White House, too, has condemned corporate malfeasance and called for widespread reforms. *See, e.g.*, Press Release, White House, Fact Sheet: Corporate Fraud Conference Sponsored by President's Corporate Fraud Task Force (Sept. 26, 2002), *at* http://www.whitehouse.gov/news/releases/2002/09/20020926-2.html ("The Administration continues to pursue an aggressive agenda to fight corporate fraud and abuse," including "[e]xposing and punishing acts of corruption," [h]olding corporate officers and directors accountable," and "[m]oving corporate accounting out of the shadows.") *Id.*

[103] For discussions of common triggers of internal investigations, see, for example, Raymond C. Marshall, *Conducting Internal Investigations—What to Do and Not to Do*, *in* CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS, at 25 (Am. Law Inst.-Am. Bar Ass'n Course of Study, No. SG014, 2001); Kuehne, *supra* note 3, at 661-66.

entity and its constituents. In some instances, internal investigations are mandated by statutes[104] such as the Anti-Kickback Enforcement Act of 1986,[105] the Medicare Fraud Reporting Act,[106] and federal banking regulations.[107] In other situations the rules of industry entities and associations, such as the New York Stock Exchange,[108] the American Stock Exchange,[109] and the National Association of Securities

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[104] *See generally* Thomas E. Holliday & Charles J. Stevens, *Disclosure of Results of Internal Investigations to the Government or Other Third Parties*, *in* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 12, at 283-85.

[105] 41 U.S.C. § 57 (2000) (requiring government contractors to file written report with Inspector General of contracting federal agency whenever there are reasonable grounds to believe that a kickback may have occurred among contracting parties).

[106] 42 U.S.C. § 1320a-7b(a)(3) (2000) (felony offense for a person with "knowledge of . . . any event affecting his initial or continued right to any . . . benefit or payment" to "conceal or fail to disclose" that event).

[107] *See, e.g.*, 12 C.F.R § 21.11 (1989).

[108] *See* New York Stock Exchange Rule 342.21 (member firms must undertake investigation of trades that appear to violate law). *See generally*, Ralph C. Ferraro, *Internal Corporate Investigations and the SEC's Message to Directors in Cooper Companies*, 65 U. CIN. L. REV. 75 (1996). New York Stock Exchange rules require members to report employee violations of "any securities law or regulation, or any agreement with or rule or standards of conduct of any governmental agency, self-regulatory organization, or business or professional organization." NYSE Rule 351(a)(1). NYSE Rule 351(a)(10) mandates disclosure of significant disciplinary actions against employees—i.e., those "involving suspension, termination, the withholding of commissions or impositions of fines in excess of $2500, or any other significant limitation on activities." Mere suspicion of violations, including the decision to initiate an internal investigation, does not require reporting, but NYSE Rule 351(e) requires periodic reporting of unresolved investigations into possible insider trading by employees or member firms. *See* Susan L. Merrill, *Internal Investigations*, *in* SECURITIES LITIGATION: PLANNING & STRATEGIES, at 91, 115-16 (Am. Law Inst.-Am. Bar Ass'n Course of Study, No. SG091, 2002).

[109] American Stock Exchange, *Sec. 401, Outline of Exchange Disclosure Policies* (pertaining to required inquiries and disclosures), *at* http://wallstreet.cch.com/americanstockexchangeamex/amexcompanyguide listingstandards,policiesandrequirements/part4/disclosuress401-404/072F000374.asp (last visited Oct. 22, 2003).

Dealers,[110] require ongoing investigation and/or disclosure in situations involving suspicious circumstances or allegations of wrongdoing,[111] and federal securities laws mandate disclosure of facts material to the financial status of publicly traded companies.[112]

Not every allegation of wrongdoing requires investigation, and, in some instances, an entity may be in a more vulnerable position after investigating.[113] Nevertheless, the internal investigation has become the standard of care whenever credible allegations of significant misconduct are raised in organizational settings.[114] As one commentator has noted:

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[110] N.A.S.D. Conduct Rule 3070 (regarding required disclosures), *at* http://cchwallstreet.com/nasd/nasdviewer.asp?SelectedNode=3&FileName=/nasd/nasd_rules/RulesoftheAssociation_mg.xml#chp_1_3_63 (last visited Oct. 22, 2003).

[111] *See* sources cited *supra* notes 108-09.

[112] *See generally* 15 U.S.C. § 78m (2000).

[113] *See supra* note 10. As one expert notes:

> First, if confidentiality of the investigative work product cannot be maintained, the corporation by conducting an investigation merely may be building a case on behalf of the company's private or governmental adversaries, against the corporation's interest and the interests of its shareholders. Second, depending on what corporate skeletons are turned up, in light of the company's disclosure obligations under the federal securities laws, the company by investigating may be forced to make more negative disclosures than it otherwise would, thereby injuring its shareholders. In addition, the information uncovered, if publicized, may embarrass or physically endanger employees, agents, or other involved individuals and may cause existing or potential customers to shift their business to the company's competitors.

Mathews, *supra* note 25, at 672 (footnote omitted).

[114] "[I]nternal investigations are a critical tool through which corporations (both publicly and privately-held) can achieve accountability either in the eyes of the public generally or its stockholders." McLaughlin & McCarthy, *supra* note 10, at 993 (citing Anne C. Flannery and Jennifer S. Milano, *Protection of Internal Corporate Investigative Materials Under the Attorney-Client Privilege and Work Product Doctrine*, METROPOLITAN

> [M]any prosecutors and regulators have come to expect that with the slightest hint of trouble, corporations will investigate themselves and, indeed, upon the discovery of trouble turn themselves in to authorities. Whereas, in the past, companies were given extraordinary credit for investigating themselves and laying their problems before the Government, today it is often simply expected—the punishment for failing to investigate and report illegal conduct can be severe . . . Like it or not, internal investigations are now a part of a company's daily life and a part of the regulatory landscape.[115]

While corporate managers once worried about what an investigation might uncover, in the wake of the Enron, World Com, Tyco and other recent corporate financial fiascos, the risks of failing to recognize significant legal problems—for corporations, individuals implicated in the challenged conduct, innocent employees, investors and the public—are greater than ever before.[116]

CORPORATE COUNSEL, Dec. 1997, and Stanley S. Arkin, *Internal Corporate Investigations*, 216 N.Y. L.J. 3 (1996)).

[115] Merrill, *supra* note 108, at 95. *See also, e.g.*, Kuehne, *supra* note 3, at 652 ("Today, business survival, may well depend upon the existence and effectiveness of an internal corporate investigation plan and compliance program.").

[116] *See, e.g.*, Scott D. Hammond, *When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?, in* CORPORATE COMPLIANCE 2001, at 325, 328 (PLI Corporate Law & Practice Course, Handbook Series No. 1248, 2001). "It is a far riskier proposition today to roll the dice and choose not to report antitrust wrongdoing than it used to be." *Id.* The Antitrust Division of the DOJ has an Amnesty Plus program that offers amnesty to a company that reports an antitrust violation and cooperates in the full investigation of the suspected offense, but the benefits of the program are available only to the first reporter. *Id.* With respect to subsequent offenses,

> [i]f a company is knowledgeable about a second offense and decides not to report it, and the conduct is later discovered and successfully prosecuted, where appropriate, [the Antitrust Division] will urge the sentencing court to consider the company's and any culpable executive's failure to report the conduct voluntarily as an aggravating

E. The Mechanics of the Internal Investigation and the Pivotal Importance of the Employee Interview

Generally, internal investigations endeavor to answer the following kinds of questions: (1) Has misconduct occurred? (2) What is the nature and scope of the misconduct? (3) Is the problem past history, or is it ongoing? (4) Who is involved? (5) Who is responsible? (6) Why did the misconduct occur? (6) How widespread is it—i.e., is this an isolated instance or a systemic problem? Once these questions are answered to the extent possible under the particular circumstances, decision makers must address another set of questions: (1) What remedial steps need to be taken to ensure that the problem does not occur again? (2) Is it necessary or appropriate to mete out disciplinary sanctions? (3) How can any the company remedy any damage and redress any injuries? (4) Would it be prudent to initiate corporate compliance measures, or revamp an existing compliance program? (5) Must, or should, the corporation disclose any misconduct uncovered by the investigation to federal and/or state authorities? The last question is perhaps the most critical for the welfare of the organization and individuals implicated in the alleged misconduct.

Once the necessity for an internal investigation becomes apparent, and the overall objectives of the inquiry are

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> sentencing factor . . . [and] pursue a fine or jail sentence at the upper end of the Guidelines range.

Id. at 332. As a result of this policy,

> [f]or a company, the failure to self report under the Amnesty Plus program could mean the difference between a potential fine as high as 80 percent or more of the volume of affected commerce versus no fine at all on the Amnesty Plus product. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether.

Id.

defined,[117] a number of questions arise about who should conduct the project and how the investigators should go about conducting their inquiries.[118] Not surprisingly, lawyers almost always believe that counsel should undertake internal investigations. There are two principal reasons: (1) the need for legal expertise to determine whether questioned acts or omissions violate the law, and (2) the availability of the protections of the attorney-client and work-product privileges.[119]

Lawyers themselves debate questions such as whether inside or outside counsel are best suited to handle particular investigations,[120] and whether the approval of the company's

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[117] In general, the precise objectives and scope of the investigation are not finalized until it is determined who will investigate—e.g., an outside law firm, in-house counsel, or a combination of the two—and the lawyers conducting the investigation have had an opportunity to review and advise the client's representatives on the relevant law and other important considerations.

[118] For discussions of various approaches, see, for example, Bennett et al., *supra* note 48, at 40-41, 46, 58-64; Marshall, *supra* note 103; Best, *supra* note 48, at 553-54, 559-63; Gregory J. Wallace & Jay W. Waks, *Internal Investigation of Suspected Wrongdoing by Corporate Employees*, *in* ADVANCED CORPORATE COMPLIANCE WORKSHOP 2000, at 507, 510-11 (PLI Corporate Law and Practice Course, Handbook Series No. 507, 2000).

[119] *See* Upjohn v. United States, 449 U.S. 394 (1981); discussion *infra* at text accompanying notes 135-70. *See generally* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4.14 (2d ed., updated 2003).

[120] The consensus is that outside counsel should ordinarily direct the investigation. *See, e.g.*, sources cited *supra* note 118. Of course, many of the commentators are members of law firms. Nevertheless, there are some important reasons why it may be useful to have outside counsel involved. Retention of outside counsel may enhance privilege protection—because the work of inside counsel may sometimes be construed as unprivileged business advice rather than protected legal counsel; outside law firms generally can call up more resources to handle investigations on an expedited basis; and involvement of outside counsel may relieve inside lawyers of the burden of investigating senior managers and coworkers. *See, e.g.*, Bennett et al., *supra* note 48, at 38-41; Merrill, *supra* note 108, at 97-98. In addition, government officials traditionally have been more willing to credit the results of investigations conducted by outside counsel, although the failure of major law firms adequately to address serious

board of directors is necessary to initiate an internal investigation—usually in situations involving allegations of serious misconduct, charges of pervasive wrongdoing, or accusations against senior managers.[121] Other issues that frequently arise include deciding to whom investigators should report their findings[122] and whether they should deliver their analysis orally or in writing.[123] There are many possible ways to go about an investigation. Relevant factors encompass, among others, the urgency of the matter, the nature of the allegations, the scope of the perceived problem, the level of those purportedly involved, the need for prior and/or ongoing consultation with the board of directors, and the extent of potential disruption of business operations.[124]

Most commentators agree that it is usually best to begin with obtaining and reviewing relevant documents.[125] It is

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corporate issues in recent corporate scandals casts some doubt on the validity of this conclusion. *See id.*

[121] *See, e.g.*, Kuehne, *supra* note 3, at 665; BLACK, *supra* note 26, § 2.02.

[122] *See, e.g.*, BLACK, *supra* note 26, § 5.01; Kuehne, *supra* note 3, at 681; Merrill, *supra* note 108, at 120-21; Bennett et al., *supra* note 48, at 58.

[123] *See, e.g.*, BLACK, *supra* note 26, § 5.01; Kuehne, *supra* note 3, at 681; Merrill, *supra* note 108, at 120-21; Bennett et al., *supra* note 48, at 58.

[124] *See generally* BLACK, *supra* note 26, § 6.03; Marshall, *supra* note 103, at 30; Turk, *supra* note 12, at 93.

[125] Often, however, factors such as timing or geographic location of facilities and employees, as well as the preferences of the client constituents who retain counsel, mandate selection of one strategy over another. *See, e.g.*, Bennett et al., *supra* note 48, at 46-47. For example, an internal investigation initiated by the directors of a company already in severe financial difficulty or subject to intensive government investigation may have a shape and scope quite different from that initiated by the managers of a corporation in good financial health for the purpose of following up on an indication of a discrete problem. The last-ditch investigative effort conducted at the request of the Enron board by William Powers, Jr., Dean of the University of Texas Law School, is an example of the former. *See, e.g.*, Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corporation, *supra* note 9; Christopher Stern, *U.S. Seeks Delay in Publication of WorldCom Report*, WASH. POST, March 13, 2003, at E02. It is more

clear that immediate steps should be taken to prevent the destruction of any possibly relevant documents, as well as email messages, video and audio recordings, or any of a host of other potentially related materials.[126] The passage of Sarbanes-Oxley heightens existing document protection requirements. While, prior to the Act's passage, deliberate document destruction could result in prosecution for obstruction of justice,[127] the new law expands the potential bases for criminal liability for "altering, concealing mutilating, destroying or otherwise falsifying" documents[128] in connection with official proceedings including judicial, agency and Congressional proceedings,[129] and it adds new record-keeping requirements for audit papers.[130] With respect to an internal investigation, these provisions heighten the importance of finding and securing relevant documentation and other records as soon as the need for the inquiry becomes evident.[131]

While documents may provide the clearest record of key events or transactions, the most revealing information comes from employees. Thus, the pivotal element of almost every internal investigation—and the most informative and

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difficult to find examples of the latter because they are far less likely ever to come to light. One example that did is the inquiry conducted by Upjohn Company that led to the Supreme Court's landmark decision on the applicability of the attorney-client and work-product privileges in the corporate context. *See infra* text accompanying notes 135-72.

[126] A commonly utilized tool is a written memorandum ("non-destruct memorandum") instructing employees not to discard or destroy any relevant documents or other materials. *See, e.g.*, Bennett et al., *supra* note 48, at 560; BLACK, *supra* note 26, § 5.01; Kuehne, *supra* note 3, at 679; Wallace & Waks, *supra* note 118, at 509.

[127] *See supra* note 80.

[128] Sarbanes-Oxley Act, *supra* note 4, § 802(a) (to be codified at 18 U.S.C. §1519).

[129] *Id.*

[130] Sarbanes-Oxley Act, *supra* note 4, § 802(a) (to be codified at 18 U.S.C. § 1520).

[131] This is the function of a "non-destruct" memorandum to all personnel, agents and other constituents who may have relevant records of any kind. *See supra* note 126.

stressful part for all concerned—is the employee interview. From line employees to senior managers, the people who act on behalf of the corporation are best able to explain critical events and provide relevant background information. Without this information, investigators are likely to lack a clear picture of key events, and the objectives of the inquiry may be frustrated. Conversely, when employees cooperate in an internal investigation, investigators have an opportunity to put events in context. Information provided in interviews helps counsel to get a sense of the organization's culture, to learn about key personalities, and to assess witness demeanor and credibility. Documents are the bare bones, but interviews are the heart and soul of an internal investigation. Correspondingly, it is in the interview phase that difficult ethical issues most often arise. Before turning to a discussion of these dilemmas, however, it is important to understand the effect of persistent demands by prosecutors and regulatory agencies for privilege waivers, and other kinds of organizational "cooperation."

III. THE IMPACT OF GOVERNMENT DEMANDS FOR PRIVILEGE WAIVERS AND OTHER CORPORATE COOPERATION

In the 1960s and 1970s, as discussed above,[132] internal investigations most often took place as a result of enforcement proceedings. For example, consent decrees between publicly traded companies and the SEC frequently incorporated requirements for internal investigations initiated by independent board members, conducted by special counsel, and sometimes monitored by a federal district judge or agency personnel.[133] In these contexts, questions of privilege rarely arose. As organizations began to engage in their own investigations in efforts to avoid criminal and civil liability, the importance of the protections afforded by the attorney-client and work-product privileges

[132] *See supra* text accompanying notes 30-48.

[133] *See supra* text accompanying notes 32-36.

became clear. So long as the fruits of internal investigations were viewed as confidential attorney-client communications and attorney work product, both counsel and corporate clients had substantial leeway to explore possible courses of action to address investigative findings.

Prosecutors and agency enforcement personnel, however, began to seek access to the results of internal investigations, including attorneys' notes and memoranda. The government's interest in information gathered by corporate investigators is understandable. This is especially true in voluntary disclosure situations in which corporate counsel has handled all or most of the relevant investigation. Law enforcement authorities have a legitimate concern that the government cannot accurately assess the full scope of the misconduct at issue and the degree to which both the entity and individuals may be criminally liable without accurate and complete information. Prosecutors are justifiably wary of attempts to shield culpable senior managers from liability at the expense of the entity and its shareholders. Consequently, they argued that attorney-client and work-product privileges should not protect materials gathered or created in the course of internal investigations. The debate over the applicability of the attorney-client and work-product privileges to internal investigations at issue in federal judicial proceedings came to a head in 1981 in *Upjohn Co. v. United States*.[134]

A. *Upjohn* and the Role of the Attorney-Client and Work-Product Privileges in the Context of Internal Investigations

The debate in *Upjohn Co. v. United States*[135] focused on the scope of the attorney-client and work-product privileges in the context of Federal Rule of Evidence 501: "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the

[134] 449 U.S. 383 (1981).

[135] *Id.*

United States in light of reason and experience."[136] The contested materials consisted of the fruits of an internal investigation of questionable foreign payments. Upjohn's general counsel initiated the investigation after obtaining advice from outside counsel and consulting with the chairman of the company's board of directors.[137] When the Internal Revenue Service subpoenaed questionnaires sent to and returned by Upjohn employees around the world, as well as documents, memoranda and notes gathered or written by counsel in the course of the investigation, the company asserted that the materials were protected by the attorney-client and work-product privileges.[138] The government sought enforcement of the administrative subpoena in the United States District Court for the Western District of Michigan,[139] contending that the documents were not protected by either privilege.[140] With respect to the attorney-client privilege, the government argued that neither of the approaches then utilized by various federal appellate courts—the control group test or the subject matter test[141]—protected Upjohn's materials.[142] The district court, on the basis of a United States Magistrate's recommendations, held that Upjohn had waived its attorney-client privilege.[143] The United States Court of Appeals for the Second Circuit overruled the lower court on the waiver issue[144] and applied a

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[136] 449 U.S. at 389 (quoting FED. R. EVID. 501).

[137] 449 U.S. at 386.

[138] *Id.* at 388.

[139] *Id.*

[140] *Id.*

[141] *Id.* The control group test considers whether purportedly privileged documents reflect communications between counsel and corporate constituents who have authority to control the corporation's actions, including the investigation itself. The subject matter test focuses instead on whether the communication is within the subject matter of the constituent's corporate responsibilities. For discussion of these tests in comparison with the *Upjohn* decision, see RICE, *supra* note 119, § 4.14.

[142] 449 U.S. at 388.

[143] *Id.*

[144] *Id.* at 388; United States v. Upjohn Co., 600 F.2d 1223, 1225-27 (2d Cir. 1966).

version of the control group test. The appellate court held that the communications at issue were privileged only insofar as they were limited to exchanges between Upjohn's lawyers and the senior executives controlling the company's response to the relevant legal advice, and remanded the case for determination of the members of the control group.[145] The Second Circuit also ruled against the company on the work-product privilege claim,[146] opining that the doctrine did not apply to administrative summonses.[147]

The Supreme Court reversed the Second Circuit and held in favor of Upjohn on both issues.[148] The Court ruled that corporations have a right to assert the attorney-client and work-product privileges to protect the confidentiality of corporate attorneys' communications with client representatives, as well as notes and memoranda prepared by counsel in the context of an internal investigation.[149] In reaching this conclusion, the Court specifically rejected the control group test adopted by the court of appeals[150] and declined to adopt the competing subject-matter test.[151] The Court, in an opinion by then Justice Rehnquist, reasoned that the control group test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[152] The Court noted that "corporations, unlike most individuals, 'constantly

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[145] 449 U.S. at 388; 600 F.2d at 1227.

[146] 449 U.S. at 389; 600 F.2d at 1227.

[147] 449 U.S. at 389; 600 F.2d at 1227 n.12.

[148] 449 U.S. at 396-97, 402.

[149] *Id.* at 386.

[150] In applying *Upjohn,* the lower federal courts have adopted a number of different approaches. *See generally* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5483 (2d ed. 1986). For discussion and comparison of the control group and subject matter tests, see RICE, *supra* note 119, §§ 4.13-.14.

[151] *See* Carole Basri, *Confidentiality of Corporate Communications, in* CORPORATE COMPLIANCE 2001, at 181, 185 (PLI Corporate Law and Practice Course, Handbook Series No. 1249, 2001).

[152] 449 U.S. at 392.

go to lawyers to find out how to obey the law,'"[153] because corporate legal compliance "is hardly an instinctive matter."[154] The Court further stated:

> [t]he narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem, but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.[155]

In particular, the Court observed:

> if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.[156]

Rejecting the government's argument that risk of liability alone would ensure that corporations would seek legal advice, the Court stated that the government's position "ignore[d] the fact that the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken."[157] The Court held the attorney-client privilege applicable on grounds that "[t]he communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate supervisors in order to secure legal advice from counsel,"[158] and the communications concerned matters within the scope of the employees' corporate duties.[159]

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[153] *Id.* (quoting Bryson P. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW 901, 913 (1969)).

[154] 449 U.S. at 392.

[155] *Id.*

[156] *Id.* at 393.

[157] *Id.* at 393 n.2.

[158] *Id.* at 394 (footnote omitted).

[159] *Id.*

The Court noted that the work-product doctrine, originally set forth in its 1947 decision in *Hickman v. Taylor*,[160] had since been reaffirmed in *United States v. Nobles*,[161] and incorporated into Federal Rule of Civil Procedure 26(b)(3).[162] The Court emphasized the underlying policy that "it is essential that a lawyer work with a certain degree of privacy,"[163] reiterating its admonition in *Hickman v. Taylor*[164] that:

> if discovery of the material sought were permitted "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."[165]

The Court also pointed to the distinction in categories of work product set forth in Rule 26(b)(3) and stressed the need to accord special protection against disclosure of the mental impressions, conclusions, opinions or legal theories of counsel concerning litigation.[166]

In subsequent cases, although the Court has permitted some exceptions to the attorney-client and work-product privileges, it has continued to affirm the availability of these protections to corporations.[167] While the lower federal courts

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[160] 329 U.S. 495 (1947).

[161] 422 U.S. 225, 236-40 (1975).

[162] FED. R. CIV. P. 26(b)(3).

[163] 449 U.S. at 397-98.

[164] 329 U.S. at 511.

[165] 449 U.S. at 398 (quoting 329 U.S. at 511).

[166] *Id.* at 400.

[167] *See* RICE, *supra* note 119, § 4:14; JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES § 1.03, at 1-23, 1-24 nn.26-28 (1999). For a review of Supreme Court cases addressing the applicability of the attorney-client privilege, see Brian Sheppard, *Views of the United States Supreme Court as to Attorney-Client Privilege*, 159 A.L.R. FED. 243 (2000). For discussion

have had difficulty interpreting and applying *Upjohn*,[168] when investigating counsel conduct the inquiry appropriately, it is clear that both privileges apply to the fruits of internal investigations.[169] A number of state courts, though not bound by *Upjohn* with respect to state privilege rules, have followed the Supreme Court's lead, while others continue to apply the control group or subject matter tests in matters governed by state law.[170]

Since the Supreme Court decided *Upjohn* in 1981, some jurisdictions have also recognized a "self-evaluative" privilege that protects an entity's internal efforts to discover

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and analysis of the application of the attorney-client and work-product privileges in the corporate context, see, for example, Alexander C. Black, *What Corporate Communications Are Entitled to Attorney-Client Privilege*, 26 A.L.R. 5TH 628 (1995); BLACK, *supra* note 26, §§ 6.01-.02; John F. Savarese and Carol Miller, *Protecting Privilege and Dealing Fairly with Employees While Conducting An Internal Investigation*, *in* CRISIS MANAGEMENT & BUSINESS RECOVERY: ARE YOU PREPARED?, at 63, 69-86 (PLI Corporate Law and Practice Course, Handbook Series No. 1296, 2000). For a comparative analysis of the applicability of the privilege with respect to the work of in-house corporate counsel, see VILLA, *supra*, §§ 1.01-.28.

[168] Basri, *supra* note 151, at 186-88. *See generally* Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33 (1997). One of the most significant developments in the post-*Upjohn* era is the development of the law with respect to the relationship of voluntary disclosure to continued assertion of the attorney-client and work-product privileges. The seminal case is the Third Circuit's decision in *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). *See generally* Burke, *supra*, at 33 ("While [voluntary] disclosure might help the private party to resolve its differences with the government, that party must be mindful that a court may order the disclosure of this otherwise privileged information to third-party civil litigants seeking to take advantage of the investigative work of the party and/or its legal counsel."); Alec Koch, *Internal Corporate Investigations: The Waiver of Attorney-Client Privilege and Work-Product Protection Through Voluntary Disclosures to the Government*, 34 AM. CRIM. L. REV. 347 (1997).

[169] *See* RICE, *supra* note 119, § 4:14 (attorney-client and work-product privileges); VILLA, *supra* note 167, § 1.22 (attorney-client privilege).

[170] *See* Basri, *supra* note 151, at 186.

and remedy misconduct.[171] The self-evaluative privilege affords valuable protection in jurisdictions where it is available to companies conducting internal investigations. It is not widely recognized in the context of criminal investigations however.[172]

B. An End-run Around *Upjohn*: Privilege Waivers as the Price of Cooperation with the Federal Government

1. Recent Trends in Federal Sentencing of Corporate Defendants

As the risks of corporate criminal and civil liability began to increase, and the potentially staggering consequences became clear,[173] more and more corporate defendants chose to settle with the government rather than litigate. From 1997 to 2000, close to ninety percent of all corporate defendants in federal criminal proceedings pled guilty;[174] by 2001 the number had climbed to nearly ninety-three percent.[175] The United States Sentencing Commission's *Organizational Sentencing Guidelines*[176] have encouraged this trend. The *Guidelines* permit a corporation facing sentencing proceedings to lower its culpability score by showing that at the time the offense occurred the company had in place an "effective program to prevent and detect

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[171] *See* BLACK, *supra* note 26, § 6.03; McLaughlin & McCarthy, *supra* note 10, at 998-99; VILLA, *supra* note 167, § 1.18; James S. Bolan, *Attorney-Client Privilege for In-House Counsel "Advocats Avec Frontiers," in* LEGAL PROBLEMS OF MUSEUM ADMINISTRATION, at 217, 237 (Am. Law Inst.–Am. Bar. Ass'n Course of Study, No. SE61, 2000); Savarese & Miller, *supra* note 167, at 95-97.

[172] *See* BLACK, *supra* note 26, § 6.03; Savarese & Miller, *supra* note 167, at 95.

[173] *See supra* note 75 and text accompanying notes 66-98.

[174] Cloherty et al., *supra* note 15, at n.6 (citing USSC statistics).

[175] *Id.*

[176] U.S. SENTENCING GUIDELINES MANUAL § 8 (2002).

violations of the law,"[177] or by demonstrating "[s]elf-reporting, cooperation, and acceptance of responsibility" for the organization's wrongful conduct.[178]

As a recent article points out, the *Organizational Sentencing Guidelines* have not yet evolved in the same fashion as those applicable to individuals.[179] Not surprisingly, there are far fewer prosecutions of corporations than of individuals[180]—the relative numbers of each guarantee that this will always be the case. Nevertheless, the Sentencing Commission's data shed light on the invocation of these standards. For example, the concept of corporate compliance programs highlighted by the *Guidelines* has received considerable fanfare.[181] Compliance programs of various sorts have become standard practice—outpaced only by the exponentially expanding number of "experts" from consultants, accounting companies, and law

[177] *Id.* § 8C2.5(f). Pursuant to the U.S.S.G., an effective compliance program requires seven key elements: (1) compliance standards and procedures for employees that are reasonably capable of reducing the possibility of criminal misconduct; (2) assignment of overall compliance responsibility to high-level personnel in the organization; (3) use of due care to avoid delegating substantial discretionary authority to persons the organization knows, or should know, have a propensity to engage in illegal activity; (4) effective communication of compliance standards and procedures to all employees; (5) putting in place monitoring and auditing systems designed to detect criminal conduct, along with a highly publicized reporting system that employees know they can utilize without fear of retribution; (6) consistent enforcement of compliance standards, including discipline of offenders and responsible persons who fail to detect offenses; and (7) appropriate responses to offenses detected, including steps to prevent similar offenses. U.S. SENTENCING GUIDELINES MANUAL § 8A1.2, application note 3(k) (2002).

[178] *Id.* § 8C2.5(g).

[179] Cloherty et al., *supra* note 15, at text accompanying note 4 (noting the absence of judicial decisions analyzing the applicability of sentencing criteria to corporate defendants in contrast to the number of cases interpreting application of the U.S.S.G. to the sentencing of individuals).

[180] *Id.*

[181] *See id.* at note 3 and accompanying text.

firms who offer their services to design and help implement these programs.[182]

Significantly, while compliance programs are undoubtedly of value in preventing misconduct and dealing promptly with wrongdoing when it does occur, it is very clear that it is difficult to design and implement a compliance program that will merit credit under the *Guidelines*. From 1995 to 1999, only two of 496 corporate defendants sentenced under the *Guidelines* received credit for having an effective compliance program in place,[183] while none received compliance program credit in 2000.[184] In contrast, in 2000 more than eighty-five percent of corporations received credit for cooperation and/or acceptance of responsibility.[185] As these data demonstrate, the best opportunity for organizations to reduce criminal sanctions may well lie in the areas of "cooperation" and "corporate acceptance of responsibility" for misconduct.

While the United States Sentencing Commission sets the applicable standards, it is federal prosecutors who assess corporate cooperation and acceptance of responsibility, and it is primarily prosecutors who inform the federal courts on these issues. It is also prosecutors, in conjunction with the federal agency enforcement personnel, who make the threshold decision whether to charge corporations and/or the individuals who manage and work for them.

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[182] Hundreds of advertisements for corporate compliance consultants and related services are readily available through the Internet and a wide variety of legal and accounting publications. *See, e.g.*, Directory of Consultants, Consultants-Corporate Compliance & Audits, *at* http://www.hospiceresources.net/consultantcorporatecomplianceprograms (last visited Oct. 18, 2003).

[183] Cloherty et al., *supra* note 15, at text accompanying note 29.

[184] *Id.*

[185] *Id.* at text accompanying note 32.

2. DOJ's *Federal Prosecution of Business Organizations*

The DOJ's *Federal Prosecution of Business Organizations*[186] provides guidance to assist federal prosecutors in making charging, plea negotiation and sentencing position decisions with respect to corporations and other business organizations.

An earlier version of these principles, prepared by an *ad hoc* interagency working group spearheaded by the DOJ, first appeared in 1999 as an attachment to a memorandum from then-Deputy Attorney General Eric Holder to United States Attorneys emphasizing the DOJ's commitment to prosecution of corporate offenders.[187] These principles, now incorporated into the *United States Attorneys' Manual*,[188] and most recently amended in January 2003,[189] clearly set forth the relevance of privilege waivers and corporate cooperation to the threshold decision whether to bring charges against corporate defendants, as well as determinations whether to grant amnesty or immunity to parties involved in government investigations. As the policy states:

> In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging cooperation, prosecutors should consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work-product privileges.[190]

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[186] *Federal Prosecution of Business Organizations*, *supra* note 22.

[187] Memorandum from Eric H. Holder, Jr., Deputy Attorney General, on Bringing Criminal Charges Against Corporations (June 16, 1999), *at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html (last visited Oct. 22, 2003) [hereinafter Holder Memorandum].

[188] *Id.*

[189] *Federal Prosecution of Business Organizations*, *supra* note 22.

[190] *Id.* pt. III cmt.

In connection with sentencing, the policy goes on to explain:

> One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel.[191]

The DOJ takes a similar position with respect to consideration of the effectiveness of corporate compliance programs, and negotiation of plea agreements.[192] Given the high incidence of corporate guilty pleas,[193] the latter context is particularly important. With respect to plea negotiations, the policy instructs: "in plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful."[194] To do so, among other things, "the prosecutor may request that the corporation waive attorney-client and work-product protection, make employees and agents available for

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[191] *Id.* pt. VI cmt. The policy states that DOJ does not "consider waiver of a corporation's privileges an absolute requirement," but "only one factor in evaluating the corporation's cooperation." *Id.* Nevertheless, it is clearly a very important one. As one commentator notes, "More often than not, a company under investigation for alleged environmental violations is inclined to cooperate with the agencies conducting the investigation. This reflexive response may arise from several sources, including a fear of stimulating further investigation, a concern about disbarment or suspension from government contracts or loss of a license, the desire to avoid adverse publicity and/or the natural tendency to view one's own company as a 'good corporate citizen' with nothing to hide." Marshall, *supra* note 103, at 27-28.

[192] *Federal Prosecution of Business Organizations*, *supra* note 22, pt. XII cmt.

[193] *See supra* text accompanying notes 68-71.

[194] *Federal Prosecution of Business Organizations*, *supra* note 22, pt. XII cmt.

debriefing, [and] disclose the results of its internal investigation . . . ."[195]

The policy cautions that prosecutors "generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees."[196] It instructs prosecutors deciding whether to charge corporations to consider not only an organization's "willingness to cooperate in the investigation of its agents,"[197] but "whether [a] corporation appears to be protecting its culpable employees and agents."[198] Prosecutors should factor into their calculus "a corporation's promise of support to culpable employees and agents, *either through the advancing of attorneys' fees*, through *retaining the employees without sanction* for their misconduct, or through providing information to the employees about the government's investigation pursuant to *a joint defense agreement* . . . ."[199] Inherent in this calculus is a sweeping pronouncement: corporate engagement in joint defense agreements, failure to sanction employees (whether or not they have been convicted of a crime), and advancement of attorneys' fees may all be grounds for deeming corporations uncooperative.[200]

The defense bar has repeatedly raised concerns about these policies, but with little effect to date. For example, at a March 2003 conference of the American Bar Association's Criminal Defense Section, defense attorneys related encountering "'unprecedented pressures' to cooperate and waive the privilege,"[201] and experiencing first-hand "the

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[195] *Id.*

[196] *Id.*

[197] *Id.* pt. XII.

[198] *Id.* pt. VI.

[199] *Id.* (emphasis supplied). "[O]verly broad assertions of corporate representation of employees or former employees" may also be viewed as "conduct that impedes the investigation." *Id.*

[200] *Id.* The policy excepts advancement of counsel fees required by state law. *Id.* pt. II n. 4.

[201] *Criminal Law—White Collar Crime: Programs Examine Trend Toward Seeking Corporate Waiver of Attorney-Client Privilege*, 71 U.S.L.W. 2625, 2635 (2003) [hereinafter *White Collar Crime*]. *See also,*

government's policy of viewing a corporation's payment of employees' legal fees as a sign of lack of cooperation."[202] In the words of one criminal defense lawyer, "the attorney-client privilege is under siege."[203] Federal prosecutors responded that "waivers are requested, not demanded[;] waiver is a strategic decision."[204] One Assistant United States Attorney commented that a corporate decision to waive the protection of the attorney-client and work-product privileges is comparable to an individual's decision to waive Fifth Amendment rights pursuant to a plea bargain."[205] She contended that tying acknowledgment of cooperation to a corporation's agreement to waive its attorney-client and work-product privileges is "simply a tool in the government's arsenal."[206] Defense counsel are inclined to take a different view: "Prosecutors . . . expect the corporation's lawyers to conduct an investigation for the government with tools the government does not have, particularly the threat of firing employees who refuse to provide information."[207]

Various kinds of cooperation may also significantly impact enforcement action decisions by agencies such as the

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e.g., Richard Ben-Veniste & Lee H. Rubin, *DOJ Reaffirms and Expands Aggressive Corporate Cooperation Guidelines*, LEGAL BACKGROUNDER, Apr. 4, 2003, at 1; Thomas F. Carlucci et. al., CONDUCTING CORPORATE INTERNAL INVESTIGATIONS, *in* A PRACTICAL GUIDE TO INTERNAL CORPORATE INVESTIGATIONS, at 36 (D.C. Bar Continuing Legal Education Program, 2002) (copy on file with author); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 154-56 (2000).

[202] *White Collar Crime*, *supra* note 201, at 2635.

[203] *White Collar Crime*, *supra* note 201, at 2635; *see also* Zornow & Krakaur, *supra* note 206, at 155.

[204] *White Collar Crime*, *supra* note 201, at 2635; *see also* Zornow & Krakaur, *supra* note 206, at 155.

[205] *White Collar Crime*, *supra* note 201, at 2635.

[206] *Id.*

[207] *Id.* Some members of the defense bar argue that DOJ's corporate cooperation policies are undermining the DOJ's own objectives by making it more difficult for organizations to conduct internal investigations and thereby restricting the flow of information to the government over the long term. Ben-Veniste & Rubin, *supra* note 201, at 4.

SEC, the Department of Defense, the Environmental Protection Agency, and the Department of Health and Human Services.[208] While their guidelines do not require privilege waivers or withholding of support for "culpable" employees as criteria for participation in voluntary disclosure programs, these agencies work hand in hand with the DOJ and United States Attorneys' Offices around the country. The DOJ's policies necessarily impact those of all of its client agencies.

The approach to privilege issues advanced by the DOJ's *Federal Prosecution of Business Organizations* severely compromises counsel's ability to rely on the attorney-client and work-product privileges to keep confidential any materials gathered, notes taken, or memoranda written in the course of an internal investigation. The government's policy very effectively undermines the Supreme Court's decision in *Upjohn* without the need for litigation.[209] In consequence:

> [o]nce-celebrated goals of our legal system—the client's rights of confidentiality and freedom from self-incrimination—are giving way to the government's powerful demands for the swift disclosure of all evidence relevant to investigations of corporate misconduct. With this change in

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[208] *See Federal Prosecution of Business Organizations*, *supra* note 22, pt. VI. Information pertaining to the Department of Defense's voluntary disclosure program is available at http://www.dodig.osd.mil/Inspections/IPO/vdpam.pdf (last visited Oct. 15, 2003); the Environmental Protection Agency offers information on its program at http://www.epa.gov/compliance/resources/policies/incentives/auditing/finalpolstate.pdf (last visited Oct. 15, 2003); and the parameters of the Department of Health and Human Services' voluntary disclosure program are set forth at Publication of the OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399 (Oct. 30, 1998). The SEC relies on an informal approach. The Commission articulated relevant factors in a 2001 Report of Investigation Pursuant to Sections 21(a) of the Securities Exchange Act of 1934 and Commision Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, Acct'g and Audt'g Release No. 1470 (Oct. 23, 2001).

[209] *See* Zornow & Krakaur, *supra* note 201, at 154-56.

> prosecutorial attitude, the government effectively is deputizing "Corporate America" as an arm of law enforcement at the expense of principles that lie at the core of our adversarial system of justice.[210]

Whether or not the public policy underlying the DOJ's strategy is sound, there is no question that it has dramatically affected the conduct of many internal investigations and the use of their findings.

C. The Impact of Federal Corporate Cooperation Policies on Individuals Interviewed in the Course of Internal Investigations of Potential Criminal Violations

1. Possible Loss of Fifth Amendment Protections

An employee asked to participate in an investigative interview has little choice. Refusal to do so may result in sanctions or even termination. In most states a refusal to cooperate with an internal investigation "constitutes a breach of an employee's duty of loyalty to the corporation and is good grounds for terminating his employment."[211] Until the late 1990s, the Supreme Court's *Upjohn* decision provided some assurance for both corporations and their constituents that internal investigations were truly internal.[212] The attorney-client privilege and work-product doctrine protected the materials counsel prepared in the course of their work, even if the corporation later engaged in voluntary disclosure or pleaded guilty to a criminal offense. That is no longer the case. In the current enforcement environment, as noted earlier, more than ninety percent of

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[210] *Id.*

[211] BLACK, *supra* note 26, § 4.03[2] (recommending entity consider terminating employees who decline to be interviewed). *See also* Merrill, *supra* note 108, at 113-15.

[212] Upjohn Co. v. United States, 449 U.S. 383 (1981); *see supra* text accompanying notes 148-69.

corporations charged with criminal offenses plead guilty,[213] and eighty-five percent of those companies sentenced cooperate with the government in some fashion.[214] Others avoid prosecution through extensive voluntary disclosures that may well include materials prepared in the course of internal investigations; and still others have statutory obligations to conduct internal investigations and disclose the results.[215] Consequently, if, in the course of an interview, "an employee responds to the corporate attorney in a manner which implicates him personally in criminal conduct, he may have unknowingly lost the value of his fifth amendment privilege against self-incrimination."[216] The risk that a corporate employer will turn over memoranda and notes of employee interviews to government authorities is not insignificant. Once employees have made incriminating statements to internal investigators, the privilege against self-incrimination will not protect them.[217] Moreover, in the

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[213] *See supra* text accompanying notes 68-71.

[214] *See supra* text accompanying note 185.

[215] *See supra* text accompanying notes 104-12. *See generally* Stacy L. Brainin, *Internal Investigations in Health Care: Unique Environment and the Dilemma of Disclosure*, *in* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 12, at 439-40; Michael Shepard, *No Security: Internal Investigations into Violations of the Securities Laws*, *in* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 12, at 389, 395-404; Joseph F. Coyne & Charles F. Barker, *Employees' Rights and Duties During an Internal Investigation*, *in* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 12, at 173; Holliday & Stevens, *supra* note 104, at 283-85.

[216] Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?*, 23 IND. L. REV. 1, 3-4 & n.6 (1990). Professor Tate focuses in particular on the vulnerability of lower echelon employees asked to participate in internal investigative interviews. She provides a comprehensive analysis of the Model Rules applicable to interactions between counsel and client employees, including issues pertaining to interviews, multiple representation and referral client relationships. She offers specific proposals for amendment of several Model Rules to mitigate employee vulnerability in these contexts.

[217] *See, e.g.*, Tate, *supra* note 216, at 4; Bennett et al., *supra* note 48, at 47-48; Merrill, *supra* note 108, at 99-100, 114-115; Zornow & Krakaur, *supra* note 201, at 153. A debate is beginning to emerge over whether

current enforcement environment, individual corporate actors are far more likely to spend time in jail than their predecessors. [218]

2. Disclosures that May Embarrass the Employee or Superiors

In addition to the tension between sacrifice of constitutional protections and the loss of livelihood, employees may face intra-corporate political land mines, particularly if what the employee says turns out to embarrass the employee or her superiors. A hypothetical may help to illustrate this point. Suppose, for example, that lawyers conducting an internal investigation question a Finance Department employee about questionable aspects of a major transaction. The employee provides information that reveals practices that are embarrassingly sloppy, but not illegal. If the CFO subsequently receives this information as part of counsel's report on investigative findings, even a CFO with the best of intentions may have difficulty treating the employee fairly after the investigation concludes. Thus, whether or not investigating counsel finds any significant problem with the transaction, the employee's relationship with an important and powerful superior is likely to suffer. It is also entirely possible that an unrepresented employee involved in questionable conduct may end up as a corporate scapegoat, particularly if the employee essentially confesses to engaging in some form of misconduct while a more culpable, but more legally sophisticated superior, manages to remain silent. As one

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internal corporate investigations required by statute can be considered state action. *See* Turk, *supra* note 12, at 99.

[218] *See supra* note 75 and text accompanying notes 75-86. For example, an individual convicted of an antitrust violation "faces a greater risk of jail time today than even a few years ago. Approximately 50 individual defendants were imprisoned for antitrust and related offenses in FYs 1999 and 2000, which is more than the total number of individuals imprisoned in the previous five years." Hammond, *supra* note 116, at 335.

commentator points out, lower echelon employees are particularly vulnerable to these kinds of problems.[219]

3. Failure To Comprehend the Role of Investigating Counsel

The risks to employees participating in internal interviews are apparent when one considers the objectives that corporate counsel are ethically required to pursue in conducting such investigations.[220] Counsel's first goal is to determine whether wrongdoing has occurred. If it has, it is in the corporation's best interest to show that an errant employee or agent acted on her own without either corporate encouragement or corporate authority. Consequently, counsel must pursue evidence in support of this theory. Both corporate representatives and counsel may sincerely believe that the best way to promote the corporation's interests is to find an explanation for the challenged conduct that does not result in liability for either the organization or its constituents, but this optimal outcome is often unrealistic. Whenever this is the case, corporate counsel are ethically bound to choose the interests of the corporation over those of its constituents.[221]

The employee, however, may not realize his or her potential vulnerability. A corporate constituent may know and trust the lawyers conducting the interview and misperceive their role in the investigation. While this may be particularly true for lower echelon employees who lack legal sophistication,[222] even senior employees are at risk.[223]

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[219] Tate, *supra* note 216, at 8, 11.

[220] *See infra* Part IV.A.2.(i); *see also* text accompanying notes 261-70.

[221] *Id.*

[222] *See* GEOFFREY HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 17.13, at 17-45 (2000 Supp.) (high officials may assume company counsel is their counsel); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.7, at 733 (1986) ("A principal might even come to think of the corporation's lawyer as 'my' lawyer as well. That will occur particularly, as is common, when their relationship is long-standing and developing social as well as professional dimensions.").

Although senior managers may be more savvy with respect to legal matters, if the lawyers interviewing them are people they deal with regularly, managers may respond on the basis of existing personal connections without fully appreciating the true nature of the circumstances.

4. Erroneous Expectations

In contrast, when the government approaches an employee directly, the elements of mutual trust and commitment are not present. Employees are far more likely to realize the personal risks inherent in the situation, and they have an opportunity to decline to participate without fearing job loss. Contacts by government agents may motivate employees to retain personal counsel or perhaps even request immunity in exchange for cooperation. At a minimum, if government agents interview an employee suspected of illegal conduct, the individual is entitled to the warnings constitutionally required by *Miranda v. Arizona*,[224] a cautionary statement likely to put those questioned on their guard.[225] In fact, the absence of a *Miranda* warning in an internal interview may well lull employees into believing that they are not personally at risk. As Justice Rehnquist wrote for the Court in *Dickerson*,[226] "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[227] Employees at any level may have no idea that they are providing information likely to go to federal prosecutors, or that they may be forfeiting the Fifth Amendment's protection against self-incrimination by providing information to counsel conducting the interviews.

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[223] *See, e.g.*, Tate, *supra* note 216, at 7-8. As Professor Tate points out, an employee's loyalty and commitment to his or her employer may well work against the employee's own best interests. *Id.* at 11-13.

[224] 384 U.S. 436 (1966) [hereinafter *Miranda* warnings].

[225] *Id.* at 469. *See infra* note 349.

[226] Dickerson v. United States, 530 U.S. 428 (2000).

[227] *Id.* at 443.

Consequently, the information attorneys conducting internal investigations receive from their client's constituents may be given because of an employee's sense of duty or loyalty to her employer, her relationship to attorneys she either knows or knows to be representing her employer, or the absence of admonitions so commonly associated with questioning that may lead to arrest or other law enforcement consequences.[228] If the corporation subsequently waives the attorney-client and work-product privileges with respect to the investigation, prosecutors are likely to garner all kinds of information—including potentially incriminating statements—from people who might otherwise decline to speak with prosecutors, FBI agents, or other government investigators.

Of course, the attorney-client privilege belongs to the corporation in this context, and it is possible to argue that neither senior managers nor line employees ever had any basis to expect that their statements would be kept confidential. This is counterintuitive, however. There is no reason to believe that employees at any level understand without explanation that lawyers working for their employer—especially lawyers with whom they have developed a relationship of confidence and trust—may readily metamorphose into de facto government agents.[229]

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[228] *See* Tate, *supra* note 217, at 9, 11-12; Zornow & Krakaur, *supra* note 201, at 153.

[229] The extent to which corporate employees perceive that this is so steadily erodes employees' motivation to engage in discussions with investigating counsel, despite the Supreme Court's *Upjohn* admonition that "the best route to corporate compliance with the law is 'full and frank communication between attorneys and their [corporate] clients.'" Zornow & Krakaur, *supra* note 201, at 148-49 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); Koch, *supra* note 168, at 355 & n.38 (citing Jed S. Rakoff, *Coerced Waiver of Corporate Privilege,* 214 N.Y. L.J. 3 (1995)).

D. The Consequences of Federal Corporate Cooperation Policies for Organizations

Every day businesses across the country engage in efforts to build employee loyalty.[230] Loyalty is critical to worker productivity, efficient operations and good customer service.[231] It depends on working conditions, compensation, and job satisfaction. But loyalty is also a function of the extent to which employees trust their employer and believe that the employer is interested in the well-being of its employees. Employees are unlikely to remain committed to an employer they do not trust. Consequently, companies spend a good deal of effort in team building and various kinds of programs to foster commitment and reward loyalty on the part of their employees.[232] Consultants offer programs for team-building; management gurus offer insights on culture change; human resources professionals counsel managers on building loyalty and commitment in their departments; and every bookstore has an array of resources on effective management techniques. In many ways, it is apparent that the public, too, expects employers to be loyal to their employees—plant closings or reductions in force are far more often greeted with dismay and criticism than

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[230] *See, e.g.*, *An Alternative to Cocker Spaniels*, ECONOMIST, Aug. 25, 2001 [hereinafter *Cocker Spaniels*]; *Good Work (How Companies Manage Finance Employees)*, CFO MAGAZINE, Sept. 1, 2000 [hereinafter *Good Work*]; JAMES HESKETT ET AL., THE SERVICE PROFIT CHAIN: HOW LEADING COMPANIES LINK PROFIT AND GROWTH TO LOYALTY, SATISFACTION AND VALUE (1997); DENNIS G. MCCARTHY, THE LOYALTY LINK: HOW LOYAL EMPLOYEES CREATE LOYAL CUSTOMERS (1997); THE QUEST FOR LOYALTY: CREATING VALUE THROUGH PARTNERSHIPS (Frederick F. Reicheld ed., 1996).

[231] As Professor Tate suggests, however, employees' loyalty to their employers may work against their own best interests in the internal interview context. *See* Tate, *supra* note 216, at 11-13.

[232] *See* T. J. SCHIER, SEND FLOWERS TO THE LIVING! REWARDS, CONTESTS AND INCENTIVES TO BUILD EMPLOYEE LOYALTY (2002); sources cited *supra* note 231.

admiration for the managers' savvy cost-cutting, profit-maximizing policies.[233]

While few would suggest that protection of "culpable" employees is appropriate, punishment or termination of an employee simply because a third party—whether a co-worker, prosecutor or agency—views that person as "culpable" is difficult to square with basic notions of fairness. The DOJ's current policies represent a well-intentioned attempt to prevent continued employment of dishonest employees and to thwart senior managers ready to sacrifice the organization's well-being to save themselves, but they sweep so broadly that anomalous results are sometimes inevitable. While it may be reasonable to expect organizations to disclose evidence of wrongdoing, it is hard to defend a policy that calls for employers to jettison employees on the basis of unproven allegations.

The policy against joint defense agreements discourages organizations from cooperating with individuals in defending against government charges. Perhaps most troubling of all, however, is the DOJ's position that advancement of legal fees to employees involved in criminal investigations evidences a lack of corporate cooperation with the prosecution. Corporate indemnification and fee advancement policies manifest employer-employee loyalty by providing protection against liability that may arise from actions undertaken in the course of work on behalf of the organization.[234] Indemnification and fee advancement are permitted by the Model Business Corporations Act,[235] the American Law Institute Principles of Corporate Governance,[236] courts, and state corporate codes.[237] For example, when a director

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[233] Michael Moore's classic film ROGER & ME (Dog Eat Dog Films 1989) vividly illustrates this point with respect to the closing of obsolete General Motors plants in Flint, Michigan.

[234] *See generally* ALAN R. PALMITER, CORPORATIONS: EXAMPLES & EXPLANATIONS 251 (4th ed. 1999).

[235] MODEL BUS. CORP. ACT §§ 8.51-8.56 (1984).

[236] PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 95, § 7.20.

[237] *See, e.g.*, CAL. CORP. CODE § 317 (West 2003); DEL. CODE ANN. tit. 8, § 145 (2003); N.Y. BUS. CORP. LAW §§ 721-26 (McKinney 2003). *See*

successfully defends an action against her on the merits, indemnification is mandatory under all state corporate laws.[238] Even when the director is unsuccessful, indemnification is generally discretionary if the director acted in good faith, reasonably believed that she acted in the best interests of the corporation, and parties other than the corporation's own shareholders initiated the action.[239] In criminal prosecutions, indemnification is generally permissible if the director did not have reasonable cause to believe that her actions violated the law.[240] These same principles apply to the indemnification of officers and other employees, except that employees who are neither officers nor directors are unlikely to be entitled to mandatory indemnification by statute.[241]

In light of the law of indemnification, many states also permit corporations to advance legal fees[242] if the recipient executes an undertaking to repay these advances if he is ultimately found not to be entitled to them.[243] In addition, officers, directors and employees in senior positions or with special responsibilities often have a contractual right to both indemnification and fee advancement.[244] In other cases, the corporation's articles or bylaws may afford such rights,[245] or

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generally PALMITER, *supra* note 234, § 15.1, at 253-54. In many states corporations may also purchase directors' and officers' insurance policies affording protection broader than that which corporations may provide pursuant to indemnification provisions. *See, e.g.*, MODEL BUS. CORP. ACT § 8.57 (1984); DEL. CODE ANN. tit. 8, § 145(g) (2003).

[238] PALMITER, *supra* note 234, § 15.1, at 252.

[239] *Id.*

[240] *See, e.g.*, MODEL BUS. CORP. ACT § 8.51(a)(3) (1984); PALMITER, *supra* note 234, § 15.2, at 253-54.

[241] *See* PALMITER, *supra* note 234, at 252.

[242] *Id.* at 255. *See, e.g.*, MODEL BUS. CORP. ACT § 8.53 (1984).

[243] PALMITER, *supra* note 234, at 255. Professor Palmiter notes the possibility that fee advancement might be viewed as an impermissible loan in some circumstances pursuant to § 402 of Sarbanes-Oxley. *Id.*

[244] *Id.* at 252.

[245] *Id.* Some state corporate codes limit indemnification and fee advancement benefits to those provided by statute, but others permit

the company's directors' and officers' insurance policies may also provide them.[246]

The DOJ's corporate cooperation guidelines undermine the very policies state corporate laws attempt to promote through their indemnification and fee advancement provisions. This is particularly true with respect to lower level employees who are far less likely than senior managers to have a contractual right to indemnification or fee advancement. The DOJ's policies create incentives for corporate employers to abandon employees on the basis of mere accusations long before most of these allegations have either been admitted as true or proven in a court of law.[247]

IV. CURRENT STANDARDS OF PROFESSIONAL RESPONSIBILITY APPLICABLE TO INVESTIGATIVE INTERVIEWS OF CORPORATE EMPLOYEES

Most jurisdictions base the professional responsibility standards governing attorneys on the Model Rules.[248] While all of the rules work together to establish a framework for ethical lawyering practices, Model Rules 1.3, 1.13, and 4.1 through 4.4 are particularly relevant to the conduct of employee interviews in the context of an internal investigation. Model Rule 3.8 is important because it addresses the special responsibilities of prosecutors. A review of these provisions, including discussion of post-Sarbanes-Oxley revisions to Model Rule 1.13, follows.

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corporations to extend broader rights to their officers, directors and employees. *Id.*

[246] PALMITER, *supra* note 234, § 15.2, at 255-56.

[247] As Zornow and Krakaur observe, these policies are driving "a wedge . . . between senior managers and other employees as corporations rush to meet the requests of federal prosecutors for 'cooperation.'" Zornow & Krakaur, *supra* note 201, at 147.

[248] *See* RONALD A. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY, § 1-1, at 8 (2000); HAZARD & HODES, *supra* note 222, § 1.13, at 1-23. This discussion focuses on the relevant Model Rules, with references to particularly relevant provisions of the earlier Model Code of Professional Responsibility ("Model Code").

A. Model Rules Provisions Relevant to Employee Interviews and Related Prosecutorial Corporate Cooperation Policies

1. Model Rule 1.3

Model Rule 1.3 mandates: "A lawyer shall act with reasonable diligence and promptness in representing a client."[249] Comment 1 explains:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.[250]

The comment also contains an important caveat: "[a] lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . A lawyer has professional discretion in determining the means by which a matter should be pursued."[251]

Diligent representation and zealous advocacy are fundamental to the practice of law. Few lawyers would disagree that diligence and zeal are essential attributes of effective representation. The current Model Rule is rooted in related provisions of the earlier Model Code: Disciplinary Rule 7-101(A)(1)—a lawyer "shall not intentionally . . . fail to seek the lawful objectives of his client"[252]—and Canon 7—"A lawyer should represent a client zealously within the bounds of the law."[253] On its face, Model Rule 1.3 seems neither

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[249] MODEL RULES OF PROF'L CONDUCT R. 1.3 (2003).

[250] *Id.* R. 1.3 cmt. 1.

[251] *Id.*

[252] MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1980). *See* ROTUNDA, *supra* note 248, at 80.

[253] MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980). *See* ROTUNDA, *supra* note 248, at 80.

conceptually difficult nor hard to implement. "Lawyers are agents of their clients and are therefore obligated to serve client interests loyally and effectively."[254] The meaning of diligence and zeal, however, almost always depends on context,[255] and in some situations the appropriate boundaries can be difficult to discern. Counsel representing a corporation in conducting an internal investigation face a particularly difficult situation, in part because of the nature of their client as defined in Model Rule 1.13.

2. Model Rule 1.13

Model Rule 1.13 governs lawyers' obligations to organizational clients. Recent corporate scandals and concomitant criticism of the failure of corporate counsel to prevent these problems has focused considerable attention on the components of Model Rule 1.13, particularly with respect to lawyers' obligations when corporate clients engage in wrongdoing or fail to deal with organizational misconduct. On August 12, 2003, the ABA House of Delegates adopted major substantive revisions to parts of the rule as well as to Model Rule 1.6, the standard governing the confidentiality of information relating to the representation of a client.[256] This discussion addresses the newly adopted version of Model Rule 1.13.

(i) Section 1.13(a)

Section (a) of Model Rule 1.13, unchanged by the recent amendments, describes the overall principle applicable to corporate representation: "A lawyer employed or retained by an organization represents the organization acting through

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[254] HAZARD & HODES, *supra* note 222, § 6.3, at 6-7.

[255] *Cf. id.* § 6.3, 6-8 ("Contextual detail colors every situation in which a lawyer is alleged to have fallen short.")

[256] *See* ABA Adopts New Lawyer Ethics Rules, *supra* note 17. Redline versions of amended Rules 1.6 and 1.13 are available at http://www.abanet.org/cpr/mrpc/red_rule1_13.pdf and http://www.abanet.org/cpr/mprc/red_rule1-6.pdf.

its duly authorized constituents."[257] Comment 1 explains the concept of the entity as client:

> An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. . . . "Other constituents" . . . means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.[258]

Comment 2 deals with the confidentiality of information exchanged by counsel and client constituents, incorporating the principle of *Upjohn* and the protections of Model Rule 1.6[259]: "When one of the constituents of an organizational client communicates directly with the organization's lawyer in that person's organizational capacity, the communication is protected by Model Rule 1.6."[260]

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[257] MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2003).

[258] MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 1 (2003). "The duties defined in [comment 7] apply equally to unincorporated associations." *Id.*

[259] Model Rule 1.6 addresses the confidentiality of attorney-client communications. The August 2003 amendments to Rule 1.6 do not alter a lawyer's fundamental duty to maintain client confidences, but the changes add two new grounds to existing exceptions related to fraud and substantial financial inquiry. *See* ABA Adopts New Lawyer Ethics Rules, *supra* note 17.

[260] The full text of comment 2 provides the following guidance:

> When one of the constituents of an organizational client communicates directly with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6 [confidentiality of attorney-client communications]. This does not mean, however, that constituents of an organizational client are the clients of the lawyer.

As both section 1.13(a) and comments 1 and 2 make clear, Model Rule 1.13 rests on the entity theory of the corporation.[261] The entity theory is the concept underlying most modern substantive corporate law,[262] including the Supreme Court's *Upjohn* ruling.[263] Sarbanes-Oxley has ensconced this principle in federal law.[264] In contrast to earlier concepts of the corporation as an aggregation of individuals or a nexus of contracts,[265] the entity theory ascribes a separate existence to the organization itself.[266] The first professional code adopted by the ABA, the Canons of Professional Ethics, did not refer to corporations.[267] In 1970, however, the Model Code incorporated the entity theory into Ethical Consideration 5-18:

> [A] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests, and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder,

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[261] *See, e.g.*, HAZARD & HODES, *supra* note 222, § 17.3; James R. McCall, *The Corporation as Client: Problems, Perspectives, and Partial Solutions*, 39 HASTINGS L.J. 623, 626 (1988); Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 188-93 (2001); WOLFRAM, *supra* note 222, § 13.7.2, at 732 (1986). For a discussion of the entity theory and other current and historical legal concepts of the corporation, see David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201.

[262] *See* McCall, *supra* note 261, at 267; *cf.* MODEL BUS. CORP. ACT § 3.02 (1984) (setting forth infinite duration and general powers of business corporations).

[263] *See supra* text accompanying notes 135-70.

[264] Sarbanes-Oxley "reminds attorneys of their ethical obligations of fidelity and loyalty owed to the corporate client, and not to [its] individual constituents." Fox, *supra* note 86, at 898.

[265] *See, e.g.*, Millon, *supra* note 261, at 201.

[266] Kim, *supra* note 261, at 190-93; Millon, *supra* note 262, at 206.

[267] *See* McCall, *supra* note 261, at 627.

> director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.[268]

The Model Rules and the Model Code thus share the same basic premise with respect to representation of corporate entities. This personification of the corporation is an outgrowth of the development of the Anglo-American tradition and its focus on both individual liberty and individual responsibility.[269] The notion of the corporation as an artificial person is also evident in other legal contexts—for example, laws permitting corporations to sue and be sued, as well as constitutional protections corporations can claim in some circumstances.[270]

(ii) Section 1.13(b)

The remaining provisions of Model Rule 1.13 and the accompanying comments attempt to guide counsel representing corporations through the difficult terrain often encountered in distinguishing between the artificial person that is the client entity and those who act on its behalf. The first of these provisions, section 1.13(b), emerged as a central focus of the post-Enron controversy over counsel's obligations to corporate clients in situations involving wrongdoing by an organization's constituents. Section 1.13(b) addresses the responsibility of counsel when the lawyer has knowledge of constituent misconduct that may be imputable to the organization and is likely to result in substantial injury to it.

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[268] MODEL CODE OF PROF'L RESPONSIBILITY EC 5-18 (1980).

[269] Tate, *supra* note 216, at 8 n.31. For a discussion of the evolution of the rule and the concepts supporting it, see McCall, *supra* note 261, at 627-36.

[270] Corporations, for example, can bring suit under the "dormant commerce clause," although they cannot claim the protections of the Privileges and Immunities Clause of article IV, section 2 of the United States Constitution. EDWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 446 (2d ed. 2002).

Following Enron's collapse, pressure mounted to clarify and strengthen the responsibilities of lawyers in these situations. Congress provided a substantial impetus for change in Sarbanes-Oxley. Section 307 of Sarbanes-Oxley specifically addresses attorney conduct.[271] It requires the SEC to promulgate rules governing the professional conduct of lawyers who appear and practice before the SEC.[272] After a heated public comment period, the SEC promulgated its final Part 205 Rules on January 23, 2003.[273] In relevant part the new rules provide detailed guidelines for up-ladder reporting of suspected corporate legal violations and the actions counsel must take in the event that corporate authorities fail to respond appropriately.[274] On the same date, the SEC also proposed rules requiring counsel to withdraw from

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[271] MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003). *See supra* note 86 and accompanying text.

[272] *See supra* note 86 and accompanying text. Section 307 directs the SEC to:

> issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in any representation of issuers, including a rule —
>
> (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
>
> (2) if the counsel or officer does not appropriately respond to the evidence (adopting a necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

Sarbanes-Oxley Act, *supra* note 4, § 307.

[273] 17 C.F.R. § 205 (2003).

[274] *See supra* note 86.

representing a corporation in specified circumstances and mandating reporting of counsel's withdrawal to the Commission by the lawyer or the client.[275]

While the SEC engaged in the rule-making required by Sarbanes-Oxley, the legal profession itself focused on addressing concerns about corporate governance and the role of corporate counsel. In March 2002, the ABA established a Task Force on Corporate Responsibility.[276] The Task Force Report and its recommendations respond to allegations "that through inaction, inattention, indifference, or, in some cases, conflicting personal interests or loyalties," corporate lawyers, as well as management, contributed to the corporate misconduct that culminated in such devastating results.[277] In its July 2002 Preliminary Report, the Task Force recommended reform of internal corporate governance standards and amendment of the rules governing "the professional conduct of lawyers."[278] In March 2003, in its Final Report,[279] the Task Force offered three principal proposals. Two of these recommendations dealt with the Model Rules: the first with the client confidentiality provisions of Model Rule 1.6 and the second with specific components of Model Rule 1.13's provisions pertaining to organizational clients. The third addressed corporate

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[275] *Id.*

[276] Am. Bar Ass'n Task Force on Corporate Responsibility, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 BUS. LAW 189 (2002), *available at* http://www.abanet.org/buslaw/corporateresponsibility/home.html (last visited Oct. 15, 2003). Robert Hirshorn, then president of the ABA, charged the members of the Task Force to "examine the systematic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations which have shaken confidence in the effectiveness of the governance and disclosure systems applicable to public companies in the United States." *Id.*

[277] *Id.* at 4-5.

[278] *Id.* at 195, 208.

[279] Report of the American Bar Association Task Force on Corporate Responsibility (March 31, 2003), *available at* http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf.

governance issues. As noted above, the ABA House of Delegates adopted the Task Force proposals and amended Model Rules 1.6 and 1.13 in August 2003.

The recent amendments to Model Rule 1.13 focus on section 1.13(b) in an effort to specify the responses lawyers representing organizational clients are to take upon learning that a constituent "is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization . . . ."[280] The additions included in the amended rule stress the need to report problems up the corporate ladder:

> Unless the lawyer reasonably believes that it is not necessarily in the best interest of the organization to do so, the lawyer shall refer the matter to a higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.[281]

(iii) Sections 1.13(c), (d) and (e)

The other amendments to Model Rule 1.13, set forth in sections 1.13(c), (d) and (e), augment the revisions to section 1.13(b). If the client's highest authority "insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law," and "the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,"[282] section 1.13(c) permits the lawyer to "reveal information relating to the representation whether or not Model Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial

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[280] MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003).

[281] *Id.*

[282] *Id.* R. 1.13(c).

injury to the organization."[283] Section 1.13(e) requires a lawyer who withdraws or is discharged from representation of an entity as a result of actions pursuant to the disclosure provisions of section 1.13(b) or 1.13(c) to "proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal."[284]

Section 1.13(d) creates an exception to the disclosure provisions of sections 1.13(b) and (c) when the purpose for which counsel is retained is to conduct an internal investigation on behalf of an organizational client.[285]

(iv) Section 1.13(f)

Section 1.13(f) is the provision of the Model Rules most directly relevant to employee interviews conducted as part of an internal investigation. This section, previously denominated 1.13(d), remained unchanged in the amendment process. It provides: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[286] Comment 10[287] further explains:

> There are times when the organization's interest may be or become adverse to those of one or more of its

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[283] *Id.* R. 1.3(e).

[284] *Id.*

[285] Section 1.13(d) provides:

> Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

Id. R. 1.13(d).

[286] *Id.*

[287] Previously denominated comment 7.

> constituents. In such circumstances the lawyer should advise any constituent, *whose interest the lawyer finds adverse to that of the organization* of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, *when there is such adversity of interest*, the lawyer for the organization cannot provide legal representation for that constituent individual, and that the discussions between the lawyer for the organization and the individual may not be privileged.[288]

Thus, the trigger for cautioning corporate constituents is the lawyer's determination of adversity of interest. The obligation to explain the identity of the lawyer's client and to warn the employee with respect to privilege and representation issues arises only if and when the lawyer finds such adversity.

While both the Model Rules and the accompanying comments offer guidance well beyond that provided by the Model Code in this area,[289] they are still quite open-ended, particularly in light of comment 11: "Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case."[290] Thus, while adversity of interests triggers the need for a warning, comment 11 makes it clear that the existence of such adversity is a fact-specific question subject to the determination of the investigating counsel.[291] As noted by

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[288] MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 10 (2003) (emphasis added).

[289] *See supra* text accompanying note 268.

[290] MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 11 (2003) (previously denominated comment 8).

[291] *See supra* text accompanying note 288. This duty "is actually quite narrow and provides protection to an unrepresented entity constituent that is quite skimpy." HAZARD & HODES, *supra* note 222, § 17.13, at 17-47.

comment 6, however, counsel's statements are always subject to the truthfulness requirement of Model Rule 4.1.[292]

The most significant limitation on counsel's conduct of the interview arises not from Model Rule 1.13 itself, but from the risk that a court may allow an interviewee to invoke the attorney-client privilege on grounds that she believed that the attorney represented her rather than or in addition to the corporation. It is difficult, however, for an employee to prevail on such a claim.[293]

(v) Section 1.13(g)

Section 1.13(g), identical to the provision formerly denominated 1.13(e), explains the circumstances in which dual representation of a corporation and its constituents is permissible in accordance with the conflict-of-interest provisions of Model Rule 1.7.[294] The provision notes that any consent required from the entity may be given by "an appropriate official other than the individual who is to be represented, or by the shareholders."[295]

3. Model Rules 4.1 through 4.4

Model Rules 4.1 through 4.4 govern a lawyer's dealings with persons who are not her clients. Model Rule 4.1 sets forth the fundamental requirement of truthfulness in dealing

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[292] In pertinent part, comment 6 provides as follows: "The authority and responsibility in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1." MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 6 (2003). *See supra* text accompanying notes 296-300.

[293] *See, e.g.*, Waggoner v. Snow, Becker, Kroll, Klaus & Krauss, 991 F.2d 1501 (9th Cir. 1993). *See generally* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 20, at 227; Merrill, *supra* note 108, at 100; Tate, *supra* note 216, at 26-28. Professor Tate, however, does not believe that this risk has had much impact on corporate counsel. *See id.* at 28.

[294] MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003). *See, e.g.*, *Waggoner*, 991 F.2d 1501.

[295] MODEL RULES OF PROF'L CONDUCT R. 1.13(g) (2003).

with third parties in a manner substantially similar to the earlier Code requirement.[296] In pertinent part the rule states: "In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person."[297] While comment 2 explains that not every statement should be regarded as one of fact,[298] referring to examples such as price estimates exchanged in the course of negotiations,[299] comment 1 states:

> A lawyer is required to be truthful when dealing with others on a client's behalf.... A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.[300]

Model Rules 4.2 and 4.3 specifically address counsel's dealings with represented and unrepresented persons. Model Rule 4.2 applies to persons "the lawyer knows to be represented by another lawyer in the matter,"[301] and it prohibits communications with such persons without the consent of their counsel, unless the communication is otherwise authorized by law or by court order.[302] In the context of an internal investigation Model Rule 4.2 generally requires a lawyer to refrain from interviewing a corporate employee or agent who has retained his own counsel without first obtaining counsel's consent.[303]

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[296] *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (2003) (in representing a client, "a lawyer shall not... [k]nowingly make a false statement of law or fact").

[297] MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2003).

[298] *Id.* R. 4.1 cmt. 2.

[299] *Id.*

[300] *Id.* R. 4.1 cmt 1.

[301] *Id.* R. 4.2 (2003).

[302] *Id.* The Rule's language is also substantively similar to the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98(1) (2000).

[303] This is the case unless the no-contact rule is trumped by "other law," such as "a statute or a regulation authorized by statute, a constitutional provision, or a judicial precedent." ROTUNDA, *supra* note 248, at 524 (citing MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 1 (2003)).

It is Model Rule 4.3, however, that relates most directly to situations a lawyer is likely to encounter in the course of an internal corporate investigation. Most corporate constituents will not have their own counsel at the time they are asked to participate in an investigative interview, and it is the unrepresented individual who is most at risk. Unlike Model Rule 1.13(f), Model Rule 4.3 is not designed specifically to address internal corporate investigations.[304] It provides a point of comparison, however, and some jurisdictions have utilized the rule as a basis for more extensive requirements for internal investigations. Model Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are, or have a reasonable possibility of being in conflict with the interests of the client.[305]

The rule is intended to ensure that a layperson will understand the lawyer's position with respect to the substantive issue so that the person can comprehend the lawyer's role in the matter in question.[306] Model Rule 4.3

One notable exception occurs in grand jury proceedings in which prosecutors question witnesses whose counsel are not present in the grand jury room. *See id.* at 529. In the context of a corporation or other organization, Rule 4.2 generally operates to prohibit contacts with persons who have managerial responsibility or whose acts or omissions may be imputed to the organization. *Id.* at 535.

[304] *See infra* text accompanying note 309.

[305] MODEL RULES OF PROF'L CONDUCT R. 4.3 (2003).

[306] ROTUNDA, *supra* note 248, § 33-1, at 542. The predecessor of Rule 4.3 is found in the Model Code to the effect that lawyers may not "[g]ive

arguably sets a higher standard than Model Rule 1.13(f) requires with respect to informing corporate constituents of the identity of counsel's client because there is no adversity requirement; the trigger is the lawyer's perception that the interviewee may be confused about her role. For this reason one commentator argues that Model Rule 1.13(f) should incorporate the potential confusion test of Model Rule 4.3 rather than the current adversity-of-interest standard.[307] On the basis of Model Rule 4.3, some jurisdictions have created a requirement that lawyers must fully disclose the identity of their client to the interviewee in some contexts.[308] For example, in 1998 the District of Columbia Ethics Commission concluded that in the course of an internal investigation "a lawyer must advise [corporate constituents] of his position as counsel to the corporation in the event of *any ambiguity* in his role."[309] However, Model Rule 4.3 itself does not appear to require such disclosure, unless the lawyer knows or reasonably should know that the interviewee misunderstands the lawyer's role.

Model Rule 4.4(a) completes the Model Rules' provisions governing lawyers' relationships with third parties. It mandates: "In representing a client, a lawyer shall not use

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advice to a person who is not represented by a lawyer, other than the advice to secure counsel . . . ." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(2). The Restatement also contains a similar provision in section 103. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 (2000). The Restatement, however, prohibits misleading statements about the lawyer's interest only if they would prejudice the third party, and it requires correction of misstatements only if failure to do so would result in prejudice to the non-client. *Id.* The Model Rule has led to problems of its own because of a possible interpretation that the lawyer may give advice once she has disclosed her interest. *See* HAZARD AND HODES, *supra* note 222, §§ 39-4 to 39-5.

[307] *See, e.g.*, Tate, *supra* note 216, at 60-62.

[308] *See, e.g.*, McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 112-13 (M.D.N.C. 1993) (summarizing requirements imposed by North Carolina and several courts with respect to interviews of current and former employees of adverse parties).

[309] D.C. Bar Legal Ethics Comm., Op. 269 (1997) (emphasis added) (disclosure required whenever corporation may take position adverse to constituent's interests).

means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."[310] The comment to the rule explains:

> Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons . . . .[311]

Neither the rule nor the comment, however, discusses the rights of a corporate constituent in an investigative interview.

4. Model Rule 3.8

Model Rule 3.8 addresses "Special Responsibilities of a Prosecutor."[312] Its provisions encompass probable cause requirements;[313] reasonable efforts to ensure that the accused is aware of the right to counsel, the procedure to obtain counsel and the opportunity to do so;[314] waiver of rights by unrepresented persons;[315] and disclosure of exculpatory evidence.[316] Comment 1 provides in relevant part: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[317] One expert notes: "It is often said that the duty of the public prosecutor 'is to seek justice, not merely to convict.' From this principle,

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[310] MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2003).
[311] *Id.* R. 4.4 cmt. 1.
[312] *Id.* R. 3.8.
[313] *Id.* R. 3.8(a).
[314] *Id.* R. 3.8(b).
[315] *Id.* R. 3.8(c).
[316] *Id.* R. 3.8(d).
[317] *Id.* R. 3.8 cmt. 1.

there have developed certain limitations that modify the duty of zealous behavior of government attorneys when they are acting as prosecutors in criminal cases."[318] As he further explains, "some courts have stated that government lawyers, even in civil cases, are under a higher standard than their civil counterparts."[319]

For purposes of this inquiry, the pertinent portions of Model Rule 3.8 are subsections (b) and (c):

> The prosecutor in a criminal case shall:
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> . . . .
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> (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel;
>
> (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing . . . .

These mandates reflect and build on constitutional limitations on state actors in the criminal justice system, particularly those set forth in *Miranda v. Arizona*[320] and recognized as "part of our culture" by the Supreme Court in *Dickerson v. United States*.[321] They require prosecutors "to take a reasonably generous view of these matters, rather than to extract every possible advantage from an unrepresented person before counsel becomes available . . . includ[ing] efforts to assure that the police in the jurisdiction

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[318] ROTUNDA, *supra* note 248, at 501-02 (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980) and citing MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2003)).

[319] *Id.* (citing Freeport-McMoRan Oil & Gas Co. v. Federal Energy Regulatory Comm'n, 962 F.2d 45 (D.C. Cir. 1992)).

[320] *See* Miranda v. Arizona, 384 U.S. 436 (1966). *See infra* text accompanying note 356.

[321] 530 U.S. 428, 443 (2000).

respect a defendant's rights as well."[322] The waiver prohibition reflects efforts to limit coercion and to maximize efficiency by precluding prosecutors from seeking waivers in situations where they are unlikely to withstand judicial scrutiny if challenged.[323]

Model Rule 3.8 does not relate directly to either the conduct of internal investigations or to subsequent prosecutorial demands for materials relating to the investigation. Nor does it specifically address prosecutorial policies that seek to influence corporate behavior with respect to advancement of attorneys' fees, employee sanctions or joint defense agreements. The principles established in subsections (b) and (c) are relevant however. When prosecutors seek corporate privilege waivers, as the *United States Attorneys' Manual* plainly states, these "waivers permit the government to obtain statements of possible witnesses, subjects,[324] and targets,[325] without having

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[322] HAZARD & HODES, *supra* note 222, at 34-7. *See also* STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE § 3-3.2(b) (1992):

> A prosecutor shall advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is proper for a prosecutor to so advise a witness whenever the prosecutor knows or has reason to believe that the witness may be the subject of a criminal proceeding. However, a prosecutor should not so advise a witness for the purpose of influencing the witness in favor of or against testifying.

[323] HAZARD & HODES, *supra* note 222, at 34-8.

[324] The *United States Attorneys' Manual* defines a "subject" as "[a] person whose conduct is within the scope of the grand jury's investigation." U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-11.151 (2003).

[325] A "target" is "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." *Id.* However, the government does not automatically consider an officer or employee of a target organization as an individual target "even if such officer's or employee's conduct contributes to the commission of the crime by a target organization." *Id.* The converse also holds true—i.e., an

to negotiate individual cooperation or immunity agreements."[326] When corporations fear retaining employees or advancing attorneys' fees on their behalf because prosecutors are investigating their conduct or might consider them "culpable," an employee's ability to obtain counsel is diminished. When the government obtains incriminating statements through corporate privilege waivers, an employee's right to avoid self-incrimination may also be rendered meaningless.

V. PROBLEMS INHERENT IN APPLYING CURRENT ETHICAL STANDARDS TO INVESTIGATIVE EMPLOYEE INTERVIEWS

While the Model Rules provide a comprehensive ethical framework, many gaps exist in the provisions applicable to corporate internal investigations. The changes motivated by the passage of Sarbanes-Oxley and other recent events help promote corporate accountability, but they do not address the issues most critical to the conduct of internal investigations. If anything, the recent amendments may exacerbate tensions that counsel confront in the conduct of employee interviews. A discussion of these difficulties follows.

A. Identifying the Client

Problems may arise for lawyers who represent corporations whenever a new legal challenge emerges that raises questions about who should speak for the client.[327] As noted earlier, the corporation—along with other entities such

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organization is not automatically considered a target simply because its officers or other employees are targets. *Id.*

[326] *Federal Prosecution of Business Organizations, supra* note 22, pt. IV.

[327] In some instances the Model Rules do place limitations on who can speak for an organizational client. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.13(e) (2003) (organizational consent to dual representation of entity and constituents may not be given by individual to be represented).

as partnerships, limited liability companies, and associations—is an abstraction that acts only through real people.[328] As one commentator observes, "[t]he corporation is poorly suited for the application of many legal principles developed to order a society of flesh and blood individuals."[329] Nevertheless, the Model Rules clearly provide that it is the entity that the corporate lawyer represents,[330] and the first task of any lawyer acting on behalf of a corporation or other legal entity is to determine who speaks for the client with respect to the matter at hand.[331] This is a responsibility that sometimes places corporate counsel in a difficult predicament.

When the corporate client calls upon the lawyer to conduct an internal investigation, the lawyer's task encompasses not only the preliminary inquiry as to who speaks for the client, but the critical next question: does this

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[328] *See* HAZARD AND HODES, *supra* note 222, § 2.3, at 2-17 n.1; Ralph Jonas, *Who Is the Client?: the Corporate Lawyer's Dilemma*, 39 HASTINGS L.J. 617 (1988). Jonas suggests that "the Bar should re-think some of the fundamental assumptions underlying the principal that a corporate lawyer owes his allegiance solely to the legal entity he represents. Perhaps lawyers should not have abstractions as clients." *Id.* at 622.

[329] McCall, *supra* note 261, at 625.

[330] Ironically, however, while a principal justification for the entity theory lies in the protection it affords stockholders, under the entity theory the corporate lawyer has neither a direct relationship with stockholders nor any duty running directly to them, except in a very few narrowly circumscribed and unusual circumstances. As Jonas notes, "the shareholders, who collectively are the owners of the mythical beast, typically do not participate in the process by which the lawyer is selected, retained, or fired . . . the attorney who represents the corporation does not consult nor owe any duty or allegiance of any kind whatsoever to the shareholders." Jonas, *supra* note 328, at 617 (footnote omitted).

[331] As Geoffrey Hazard observes, the entity concept embodied in Model Rule 1.13(a) poses two important problems for a corporate lawyer: first, she deals not with the actual client, but with corporate managers who supposedly speak for the client—"client-people"—and second, she must determine whether any given "client-person" has authority to speak for the client in a particular matter. Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011 (1997). Professor Hazard further observes as follows: "Put more colloquially, the problem for an attorney dealing with a corporate official is: 'Who is this guy anyway?'" *Id.*

person have a conflict of interest with respect to this matter? Consequently,

> in the corporate arena, the lawyer lives in an "Alice in Wonderland" world. The client to whom he owes undivided loyalty, fealty, and allegiance cannot speak to him except through voices that may have interests adverse to his client. He is hired and fired by people who may or may not have interests diametrically opposed to those of his client. And finally, his client is itself an illusion—a fictional "person" that exists or expires at the whim of its shareholders, whom the lawyer does not represent."[332]

Understanding these difficulties helps, but it does not resolve the underlying problem. In conducting an internal investigation, counsel must serve the interests of the entity itself—the corporation as a distinct legal person—even in instances where this recognition creates a conflict with the interests of the officer, director or employee who hired the attorney to represent the company in the first place. As a number of commentators have noted, and many practitioners have experienced first-hand, determining exactly when a conflict arises between a corporation and those who serve as its senses and soul can be an extraordinarily difficult task.[333]

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[332] Jonas, *supra* note 328, at 619. In 1988, McCall pointed out that corporate counsel will sometimes encounter situations in which the board itself—the ultimate client under Model Rule 1.13—refuses to correct a major problem or is itself engaged in activities that breach directors' fiduciary duty. He proposed that one solution would be that rejected by the ABA in a draft of Model Rule 1.13(c): "When faced with such a situation, the corporation lawyer should have the option to take his or her concerns beyond the board of directors to the shareholders or to the appropriate authorities." McCall, *supra* note 261, at 639.

[333] As George Reycraft observes, "[i]n representing the organizational client, the corporate lawyer must often grapple with conflicting duties of loyalty, confidentiality, and zeal owed to the various 'constituents' or interest groups that make up the organizational client. . . . Professional responsibility guidelines fail 'to address the[se] problems of modern corporate law practice.'" Reycraft, *supra* note 19, at 608.

> It is simply not true that a corporate lawyer can safely feel free of any fiduciary constraint when dealing with, or against, an officer or other member of the corporate client. First, loyalty to the corporation and zealous representation of its interests will require a corporate lawyer to maintain the trust and confidence of all persons in the corporation in order to assure access to important facts and in order to maintain effective lines of communication for the lawyer's advice. . . . Second, legal duties owed to the corporation, such as the lawyer's duties to protect client information . . . almost automatically entail protecting the communicative interests of individuals within the organization . . . Third, the doctrine that a lawyer owes no fiduciary obligation to a corporate officer is no warrant for attacks on corporate employees. Instead, the doctrine is a corollary to the requirement that when the interests of the corporation as a whole and any of its officers or members materially diverge, corporate counsel is required to pursue the interests of the whole and not the divergent interests of any of its parts.[334]

In short, in the conduct of an internal investigation, a lawyer must focus on representing the corporate client with diligence. Counsel's goal is to determine whether misconduct has occurred. If so, counsel's objectives are to advise the client on how to remedy any damage caused by the wrongdoing; how to avoid future problems; and how to minimize the consequences of any legal violations in an appropriate and lawful manner. While the optimal outcome is almost always that which avoids adverse consequences for both the company and its human constituents, if there is a choice to be made, counsel is ethically bound to choose the corporation. This concept now is also encompassed in federal law applicable to attorneys who practice before the SEC

[334] Wolfram, *supra* note 222, at 735.

under rules promulgated by the agency pursuant to Sarbanes-Oxley.[335]

B. The Conduct of the Interview

Under the Model Rules, it is clear that counsel conducting an internal investigation must embark upon their task with one overriding objective—to minimize the consequences of any wrongdoing for the corporation. However, while it is apparent that the entity's interests must remain first and foremost, the standards for dealing with employees and other corporate constituents interviewed in the course of the investigation are far less clear.

1. Applying the Clarification Standards of Model Rules 1.13(f) and 4.3

As discussed in the preceding section,[336] pursuant to Model Rule 1.13(f) counsel must inform employees of the client's identity only "when it is apparent that the organization's interests are adverse to those of the [employee]."[337] This is a fact-specific determination dependent on counsel's analysis of potential adversity of interest between the corporation and the employee. Particularly for counsel who are strangers to the matter and the people involved, it is likely to be very difficult to determine in advance whether such adversity exists. Adversity may become apparent only after the employee has made an incriminating statement. Even if immediately thereafter the investigating lawyer warns the employee that the attorney-client privilege affords no individual protection and explains that the employee may want to obtain personal counsel, irreparable damage may already have been done. This harm may include the loss of the Fifth Amendment's protection against self-incrimination.

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[335] *See supra* text accompanying note 86.

[336] *See supra* text accompanying notes 286-93.

[337] *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 11 (2003).

> The reality for the employee under the Model Rules is that Rule 1.13 allows a corporate attorney to withhold from the employee clarification that the entity is her only client until after the employee has confessed to a personally culpable act, despite the fact that both Model Rules 4.3 and 4.4 encourage fair treatment in an attorney's relationships with nonclients.[338]

The standard of Model Rule 4.3—calling for disclosure when there is potential for confusion as to the attorney's role—regardless of adversity, may appear fairer, but even here the attorney may have difficulty discerning whether such confusion exists. All too often, corporate employees may be anxious to appear knowledgeable, or erroneously believe that they understand counsel's role. On the basis of past experience they may believe that counsel will seek to protect both the individual and the corporation. Another hypothetical example may help illustrate this type of circumstance. Take, for example, a physician affiliated with a health care system who is accustomed to garden-variety medical malpractice actions in which both the organization and individual medical professionals associated with the entity are named as defendants. In these situations, joint representation of both the physician and the entity is common. Physicians experienced with this dual representation—either personally or through awareness of lawsuits involving colleagues—may find it incredible that the counsel they count on to protect their professional reputations and livelihood have very different objectives when conducting internal investigations.

In short, it may be overly optimistic to assume that counsel engaged in interrogating corporate constituents can either accurately predict that a particular interviewee's interests are likely to diverge from her corporate client's or readily determine that an interviewee is confused about the lawyer's role in the matter. This is especially true when there is a significant possibility that information gathered

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[338] Tate, *supra* note 216, at 25.

during an internal investigation of suspected misconduct may be turned over to the government.[339]

2. The Timing and Necessity of Pre-Interview Statements

Regardless of whether a particular jurisdiction requires a pre-interview statement,[340] many practitioners recommend that counsel routinely provide such warnings to avoid any possibility that a court will subsequently permit the individual employee to invoke the protections of the attorney-client privilege on grounds that an attorney-client relationship existed between investigating counsel and the interviewee.[341]

There are, of course, a number of downsides to requiring pre-interview statements. The most significant is that any kind of warning that distances counsel from a corporate constituent is likely to chill the willingness of the employee to talk with the investigating attorney.[342] This is an objection long since overcome with respect to *Miranda* warnings in the law enforcement context. Nevertheless, the issues are somewhat different when an employer is seeking to determine whether its employees have engaged in misconduct. Unless they enjoy a special relationship with government—for example, by virtue of a contract to carry out a function normally associated with governmental authority[343]—employers are not state actors. They may discipline or discharge an employee, but they do not have the

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[339] *See supra* text accompanying notes 201-08.

[340] *See supra* text accompanying notes 308-09.

[341] *See, e.g.*, Merrill, *supra* note 108, at 100-01 ("For the client's sake 'it is critical that there be no ambiguity about who represents whom during the investigation'"); *see also, e.g.*, Bennett et al., *supra* note 48, at 179; BLACK, *supra* note 26, § 4.03; VILLA, *supra* note 167, § 1.10; Wallace & Waks, *supra* note 118, at 512. *But see* Tate, *supra* note 216, at 15-18 (suggesting that this concern provides little motivation to investigating counsel).

[342] *See, e.g.*, Merrill, *supra* note 108, at 100; BLACK, *supra* note 26, § 4.03.

[343] *See generally* CHEMERINSKY, *supra* note 270, § 6.4.3, at 492-95.

power to curtail an individual's liberty or even to impose monetary sanctions beyond withdrawal of compensation by terminating employment.[344] In a business setting, such warnings may also create a furor over the role of counsel and the intentions of the employer with respect to its employees. Employees at all levels may be outraged that their employer seems to be turning on them and distancing itself from them. Counsel's ability to present the warnings effectively may either exacerbate or ameliorate that reaction. In any event, such an employee response is not an irrational one; the employer will almost certainly attempt to distance itself from any employee who has engaged in misconduct, even if the misconduct occurred as a result of an employee's efforts to benefit the employer.

Most experts agree that the strategic advantages of providing some type of pre-interview warning outweigh the disadvantages.[345] Nevertheless, if the rules of professional responsibility do not require pre-interview warnings, some lawyers will decide not to provide them or to offer only an abbreviated form.

3. The Content of Pre-Interview Statements

The problematic aspects of employee interviews are not limited to whether and when to provide a warning. The content of counsel's statements is equally critical, particularly with respect to the effects of the attorney-client privilege and the employee's need for her own counsel. A number of commentators have proposed various types of pre-interview statements. For example, one article suggests that

> in order to show the greatest care, all employees interviewed formally or informally should be advised:

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[344] A few commentators have raised the question whether corporate attorneys carrying out internal investigations required by statute could, in some circumstances, be considered state actors. *See, e.g.*, Coyne & Barker, *supra* note 216, at 175; Turk, *supra* note 12, at 99-100.

[345] *See, e.g.*, Merrill, *supra* note 108, at 100-01; Turk, *supra* note 12, at 97; Block & Barton, *supra* note 90, at 85.

> i. that the investigating attorneys represent the company and not any employee;
>
> ii. that the company's attorney-client privilege applies to the interviews and the company retains the right to decide whether or not to reveal to regulators or others outside the company the information obtained in any such interview; and
>
> iii. that the company wishes that the employees keep the interviews confidential and not, for example, even talk among themselves about their interviews.[346]

This model warning clearly identifies the role of the attorney. It also indicates that it is the company's decision whether it will ultimately reveal the information the employee offers in the course of the interview, although not all employees may realize that the phrase "regulators or others" may include law enforcement agents and prosecutors. The statement does not, however, address the issue of counsel for individual employees.

Another authority offers a variation bracketing optional clauses specifically addressed to issues such as retention of personal counsel:

> [I]t is important for you to know that we represent the [Audit Committee] and not you personally. We will be reporting to the [Audit Committee] on the information you and others provide to us. Unlike a lawyer representing you personally, we cannot promise to maintain your confidences or to provide you legal advice concerning your personal interests. [If you believe you have interests that differ from the Company's interests in this matter, you should consult your own personal lawyer.]

[346] Merrill, *supra* note 108, at 100. Merrill also points out that giving such warnings does not preclude later representation of the employee by the interviewing attorney. *Id.*

> The [Audit Committee] expects you to keep the facts and substance of this interview confidential . . . .
>
> The Company expects to take the position that this interview and other interviews we are conducting are protected by the attorney-client privilege and constitute attorney work product. These privileges should entitle the Company to withhold the information received from the government or other third parties. On the other hand, the Company may ultimately determine that its interests will be best served by disclosing some or all of the information we receive. You need to understand that the decision whether or not to disclose this information will be made by the Company and that you will not be able to prevent the Company from disclosing the information you provide if it decides to do so.[347]

This approach introduces the option of informing employees of their right to have individual counsel present, although an employee may not fully comprehend the "differing interests" concept. The last paragraph of this model statement, however, gives rise to another question: in the current enforcement environment is it disingenuous to indicate even that the company "expects" to invoke the attorney-client and work-product privileges to protect the information? As another article observes,

> The investigating attorney will often ask questions of a corporate employee which, if answered, might tend to incriminate the employee. Because the questions are being asked by an agent of the corporation and not the government, the Fifth Amendment offers the employee no protection against the adverse consequences of making disclosures to his employer. The attorney typically advises the employee that, though the corporation may waive the privilege at

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[347] BLACK, *supra* note 26, form 13A. Another expert suggests that investigating counsel should inform interviewees that they may wish to obtain counsel at any time—before or during the interview—that counsel perceives that there may be a reason to do so. *See* VILLA, *supra* note 167, app. 1-1.

> some point in the future, it has no present intention to do so. The attorney may tell the employee that the investigation is being conducted to allow the corporation to determine what happened and how best to proceed. In the vast majority of cases, while the employee may feel he must cooperate with his employer's inquiry, *the employee will take some comfort in counsel's representation that the company has not yet decided to disclose to the government information learned from the employee.* Historically, . . . it was not a foregone conclusion that the employee's statements would be delivered to the government—indeed, such a disclosure would have been unusual.[348]

Today's reality is far different. Even if statements about a corporation's present disclosure intentions are not actually untruthful—and therefore impermissible under Model Rule 4.1—they are likely to be misleading. In the present enforcement environment it is unwise for any corporate constituent to find solace in the corporation's intent at the time an internal investigation commences or is underway. It is disingenuous for counsel to make any statements that could lead an employee to draw such a conclusion.

A few commentators go well beyond the kind of pre-interview statements set forth above and call for full-fledged *Miranda*-type warnings.[349] For example, a recent

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[348] Zornow and Krakaur, *supra* note 201, at 153 (emphasis added).

[349] In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court ruled that the admissibility of statements given by persons in the course of custodial interrogations would depend on police provision of four warnings. As the Court explained in *Dickerson*:

> These warnings (which have come to be known colloquially as "*Miranda* rights") are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

530 U.S. at 435 (quoting *Miranda*, 384 U.S. at 479). *See supra* text accompanying notes 224-27.

commentary on employee interviews sets forth a statement composed by United States District Judge Frederick Lacey as a desirable model.[350] Judge Lacey has suggested what he terms an *Adnarim*[351] warning for use at the outset of all employee interviews conducted as part of internal corporate investigations:

> I am not your lawyer[;] I represent the corporation. It is the corporation's interests I have been retained to serve. You are entitled to have your own lawyer. If you cannot afford a lawyer, the corporation may or may not pay his fee. You may wish to consult with him before you confer with me. Among other things, you may wish to claim the privilege against self-incrimination. You may wish not to talk to me at all.
>
> What you tell me, if it relates to the performance of your duties, and is confidential, will be privileged. The privilege, however, requires explanation. It is not your privilege to claim. It is the corporation's privilege. Thus, not only can I tell, I must tell, others in the corporation what you have told me, if it is necessary to enable me to provide the legal services to the corporation that has retained it has retained me to provide.
>
> Moreover, the corporation can waive its privilege and thus, the president, or I, or someone else, can disclose to the authorities what you tell me if the corporation decides to waive its privilege.
>
> Also, if I find wrongdoing, I am under certain obligations to report it to the Board of Directors and perhaps the stockholders.
>
> Finally, the fact that our conversation is privileged does not mean that what you did or said is protected

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[350] Block & Barton, *supra* note 90, at 40. *See supra* text accompanying note 227.

[351] "Adnarim" is "Miranda" spelled backwards. *See supra* note 349 and accompanying text.

> from disclosure just because you tell me about it. You may be subpoenaed, for example, and required to tell what you did, or said or observed, even though you told me about it.
>
> Do you understand?[352]

Judge Lacey's *Adnarim* warning addresses two potential sources of employee confusion about retaining personal counsel by clearly stating that interviewees may wish to obtain their own counsel and by addressing the possibility of disclosure to law enforcement authorities openly and directly. The *Adnarim* warning is rather lengthy, however, and raises additional issues, such as subpoenas. These points may be well outside the context of the pending investigation. Helping an interviewee to understand them may require extensive explanation that could distract both employee and counsel from the principal focus of the interview. Perhaps even more importantly, this kind of warning may not only constrain the flow of information, but, as another commentator points out, "advising employees that they need not speak with company counsel may conflict with the employees' duty to cooperate, implicit in the employee's duty of loyalty."[353]

Some commentators oppose such admonitions for very practical reasons. The warnings could bring an internal investigation to a grinding halt while employees scramble to find individual counsel, even if they have no need to do so. While fairness is important, if investigating counsel embrace too many self-imposed procedural requirements, they may do a real disservice to their client. If the bar does not better define ethical rules for these situations, there will also be substantial variations in practice that serve neither the client and its employees nor the reputation of the legal profession. This is a real tension that defies easy resolution. Although various jurisdictions have begun to require more

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[352] Frederick B. Lacey, Remarks on Employee Interviews (reprinted in Block & Barton, *supra* note 90, at 40).

[353] Turk, *supra* note 12, at 99.

than Model Rule 1.13(f) mandates,[354] professional responsibility codes and judicial decisions generally do not require warnings as extensive as Judge Lacey proposes.[355]

4. Responses to Employees' Questions

Beyond the questions of the necessity, timing and content of warnings to employees interviewed in the course of internal corporate investigations lies another ethical conundrum: how should investigating counsel respond to questions that employees themselves raise? Among the most common inquiries are those focusing on the logistics of obtaining individual representation, including finding and paying for competent counsel. These questions are often pivotal, particularly for lower echelon employees.[356] There are at least three essential questions subsumed within the overall issue: (1) Will the company pay for counsel; (2) Will the company allow the employee time to obtain counsel; and (3) Where can the employee turn for assistance in finding counsel? Few commentators suggest how to resolve these questions.[357] Several propose referral of these matters to the client's General Counsel, but this begs the question. Eventually, someone—whether it is the general counsel or another corporate authority—will have to make the necessary determination. Moreover, deflecting the question may be a means of discouraging the pursuit of answers, particularly for lower level employees who may be hesitant to approach a senior corporate official.

Questions of entitlement to indemnification and fee advancement often involve both legal analysis and policy determinations. The legal analysis tracks the discussion set

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[354] *See supra* text accompanying notes 308-09.

[355] *See, e.g.*, Merrill, *supra* note 108, at 100-01; Turk, *supra* note 12, at 99.

[356] *See* Tate, *supra* note 216, at 3-4.

[357] Even Judge Lacey's *Adnarim* warning, however, does not address these issues, except to say that the company may or may not pay for an individual employee's attorney.

forth in Part III.C and D.[358] There are a number of possibilities: a corporate constituent may have a contractual or statutory right to indemnification and advancement of counsel fees, or the Board of Directors, General Counsel, or other corporate authority may have discretion to make such decisions on a case-by-case basis. The company's articles of incorporation, bylaws, or internal regulations may address the issue, or corporate directors' and officers' insurance policies may provide coverage.

In short, it may or may not be possible readily to determine whether the company will pay for an attorney, but it is unfair to leave an employee in limbo on this issue. Investigating counsel should have a clear idea of the answer going into the interview phase of the investigation. At a minimum, counsel should be prepared to provide an employee with relevant factual information such as a copy of the pertinent provisions of relevant corporate governance documents, internal regulations, or a brief policy statement from the company on this issue. If applicable, this material should include the factual information that certain employees may have contractual or statutory rights to fee advancement or indemnification. Pursuant to Model Rule 4.4, the attorney should not provide legal advice to the employee on her right to advancement of counsel fees, but, if the corporation has determined not to advance legal fees, counsel should inform the constituent that this decision may involve legal questions as to which the interviewee may want to obtain advice of counsel.[359]

Another difficult inquiry that very often arises is the simple, direct question: "Do I *need* my own lawyer?" The standard wisdom is to reply that this is a decision that only the employee can make. For example, one commentator suggests: "The answer should typically include a statement that the decision whether to retain counsel is up to the employee and (if true, as is likely early in an investigation)

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[358] *See supra* text accompanying notes 235-47.

[359] *Id.*

that the interviewer may not have enough facts to make a judgment."[360] Another offers the following advice:

> The interviewer must repeat that he or she is representing the company and cannot provide the employee with any legal advice. The employee should be instructed to direct all such questions to the company's general counsel. These points should be discussed until the employee has a clear understanding of them. If the interview is memorialized, the memorandum should state that the interviewer repeated the warnings and the employee understood them."[361]

As noted earlier, however, referring questions to the General Counsel does not solve the problem, if the General Counsel has no ready answer.[362]

More often than not, investigating counsel may not know whether or not the employee to be interviewed needs counsel at the beginning of the interview. Consequently, it makes sense to tell the employee that this is a question for the employee to decide. This may be the safest course. To go even a bit further, however, and say that the interviewer does not have the information necessary to make a judgment may be disingenuous and offer false comfort. In some instances—for example, when a lawyer conducting an internal investigation interviews an employee who counsel knows is likely to be terminated or named as culpable in the course of voluntary disclosure to government authorities—the lawyer is necessarily aware that it would be in the employee's best interest to retain her own counsel. While it would be improper under Model Rule 4.3 or any reasonable ethical standard[363] to advise the employee *against* obtaining

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[360] Merrill, *supra* note 108, at 100-01.

[361] Turk, *supra* note 12, at 103. Other commentators also suggest referring questions pertaining to representation, indemnification and related issues to the corporation's general counsel. *See, e.g.,* Lacey, *supra* note 357.

[362] *See, e.g., supra* text following note 357.

[363] *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 (2000).

personal counsel, it is permissible under current ethical standards to respond that it may be in the employee's best interests to obtain counsel.[364]

If an employee decides to obtain her own counsel, the investigating attorney needs to address the questions of how long the employee has to do so and whether to suggest names of attorneys an employee may want to consult. If the client entity is not prepared to postpone the interview for some period of time, the employee is forced to choose between possible sanctions and her need to consult with counsel. While crisis situations may demand a very short time frame, it is hard to envision any situation in which investigating counsel should decline to wait at least a short time to permit an employee to obtain the advice of counsel.[365] It is also permissible under the current Model Rules for investigating counsel to offer the names of attorneys who may be willing to represent the employee so long as the list is not presented as her only option.[366] Of course, at the conclusion of any such discussion, the question whether the corporation will pay for separate representation is likely to arise.

There is at least one creative resolution to many questions pertaining to employee counsel rights that many corporations have employed in these kinds of situations. This involves corporate retention of counsel who does not represent the corporation solely for the purpose of responding to questions raised by employees about to be interviewed in the course of an internal investigation.[367] While this kind of solution adds cost, it has many benefits. In particular, it provides a mechanism to move the

[364] The Model Rules prohibit false statements of material fact or law. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1 (2003); HAZARD & HODES, *supra* note 222, § 37.3, at 37-5.

[365] *See, e.g.*, COYNE & BARKER, *supra* note 215, at 192.

[366] *See supra* text accompanying notes 235-47.

[367] *See, e.g.*, Merrill, *supra* note 108, at 102-03.

investigation forward while still affording employees an opportunity to consult with counsel.[368]

Counsel also must anticipate that an employee may ask to have another employee present during the interview, or she may request the attendance of a union representative if she is a union member. The National Labor Relations Board ("NLRB") has determined that both union members and non-union employees have the right to request the presence of a union representative or co-worker pursuant to the National Labor Relations Act.[369] The United States Supreme Court affirmed the NLRB's decision with respect to union employees in *NLRB v. Weingarten*, holding that an employer's denial of an employee's request to have a union representative present at an investigatory interview, which the employee reasonably believed might result in disciplinary action, was an unfair labor practice.[370] The United States Court of Appeals for the District of Columbia upheld the Board's decision with respect to nonunion employees in *Epilepsy Foundation of Northeast Ohio v. NLRB*.[371]

Another question an employee may ask is what consequences, if any, will result from declining to participate in the interview. The Model Rules permit counsel to provide a simple factual statement as to company policy, so long as

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[368] In this context, it is worth noting that Model Rule 1.13 permits counsel to represent both the company and individual constituents, unless an unwaivable conflict exists. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(g), R. 1.7 (2003). In the current enforcement environment, this approach is rarely wise. Undertaking internal investigations in this fashion invites irreconcilable conflicts. *See* COYNE & BARKER, *supra* note 215, at 179 (cautioning against joint representation of company and employee).

[369] National Labor Relations Act §§ 7, 8(a)(1), 29 U.S.C §§ 157, 158(a)(1) (2000).

[370] 420 U.S. 251, 260-61 (1975).

[371] 268 F.3d 1095, 1100 (D.C. Cir. 2001). *See generally* Richard Neumeg, Annotation, *When Is Supervisory Interview by Employer "Investigatory-Disciplinary" so as to Entitle Employee to Union Representation Under § 7 of the National Labor Relations Act (§ 29 U.S.C.A. 157)*, 48 A.L.R. FED. 360 (1980).

no legal advice is impermissibly supplied. For example, if true, counsel may tell the employee that the company may decide to impose disciplinary sanctions or even terminate the employment of those who decline to cooperate in the internal investigation.[372]

C. Ethical Issues Pertaining to Prosecutors' Corporate Cooperation Policies

Prosecutorial guidelines advising or permitting prosecutors to request organizations to waive the protections of their attorney-client and work-product privileges, to determine whether a company has acceptably sanctioned allegedly culpable but unconvicted employees, and to count a corporation's advancement of fees or promises to support targeted employees as strikes against the organization for purposes of charging, plea negotiations and sentencing proceedings raise another set of ethical concerns. One major problem is that these kinds of policies invite investigating counsel to bow to the pressure to become participants in a *sotto voce* effort to obtain incriminating information from corporate constituents without basic procedural protections. As recognized by the DOJ's own business prosecution policy,[373] this approach frees the government to obtain information from individuals without any of the procedural protections our criminal justice system ordinarily affords to those accused of crimes ranging from possession of illegal drugs to murder.

It is hard to square this policy with either Model Rule 4.4's mandate that "[i]n representing a client, a lawyer shall not use . . . means of obtaining evidence that violate the rights of third parties,"[374] or the admonition of the accompanying comment: "Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer

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[372] *See* BLACK, *supra* note 26, § 4.03, at 4-7.

[373] *Federal Prosecution of Business Organizations, supra* note 22, pt. VI, cmt.

[374] *Id.*

may disregard the rights of third persons."[375] For prosecutors, these kinds of policies should also raise questions under Model Rule 3.8: [376] do they undermine the right to counsel? Do they result in the waiver of important constitutional rights such as the Fifth Amendment protection against self-incrimination by unrepresented persons?

Prosecutors' requests for waiver of corporate attorney-client and work-product protections are troublesome because they essentially enlist private companies and their counsel in doing the work of law enforcement agencies without making this connection clear to those interviewed in the course of internal investigations. Counterbalancing these concerns is the reality that law enforcement resources are inadequate to deal with all of the problems that may arise in business corporations, particularly major companies with enormous economic resources of their own and complex organizational structures. There are alternatives to blanket waiver requests however. These include requiring corporations to divulge the findings of internal investigations without turning over privileged materials, and partial waiver of the work-product privilege as to factual materials but not as to counsel's mental impressions, opinions or conclusions.[377] Prosecutors ordinarily should not have a compelling need to obtain attorney-client advice, unless the corporation raises an advice-of-counsel defense.

Other aspects of the DOJ's current corporate cooperation policies are also troublesome, particularly those pertaining to advancement of counsel fees. It is difficult to conceive of legitimate reasons for federal prosecutors to concern

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[375] MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 1 (2003).

[376] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(c) (2003); *supra* text accompanying notes 312-26.

[377] *Cf.* FED. R. CIV. P. 26(b)(3) (permitting federal courts to order disclosure of work product, but requiring courts to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"). *See also* Upjohn Co. v. United States, 449 U.S. 383, 393-94 (1981); discussion *supra* text accompanying notes 161-66.

themselves with who pays for a corporate constituent's attorney's fees. State law governs the existence, operation and governance of business corporations, and state corporations codes set both requirements for and limitations on fee advancement.[378] The only apparent reason for prosecutors to consider fee advancement as a factor in charging, plea negotiation or sentencing position decisions is to make it more difficult for individuals to obtain counsel, or at least to obtain counsel with the resources necessary to function effectively in complex corporate criminal matters. Similarly, corporations should not be penalized for failing to sanction individual constituents on the basis of unproven allegations. If a corporation improperly advances fees to officers, directors or employees who have wronged the company, or if it fails to mete out sanctions against errant managers or employees, it is the company's board of directors or its shareholders who need to address the problem.[379] If the directors fail to act, shareholder derivative actions are an appropriate means of addressing this problem.[380]

In sum, Model Rule 3.8 should clarify prosecutors' responsibilities with respect to corporate cooperation demands. It does not do so in its present form.[381]

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[378] *See supra* text accompanying notes 235-47.

[379] *See* PALMITER, *supra* note 235, § 18.1.

[380] *Id.*; Block & Barton, *supra* note 90, at 84; Reddy, *supra* note 90.

[381] Of course, there are alternative manners of dealing with the problem of ensuring fairness to those interviewed in the course of internal investigations. For example, Congress could address the problem by legislatively modifying related DOJ corporate cooperation policies as it did in the 1999 McDade Amendment, Pub. L. No. 105-119, 111 Stat. 2440 (codified at 18 U.S.C. § 3006A (2000)). The McDade Amendment overruled a DOJ policy directive issued by then-Attorney General Richard Thornburgh. The directive instructed prosecutors that they could communicate directly with "any person who has been made the subject of formal federal adversarial proceedings arising from that investigation, regardless of whether the person is known to be represented by counsel" contrary to MODEL RULES OF PROF'L CONDUCT R. 4.2 (2003), *see supra* text accompanying notes 308-10, and in direct violation of many state ethics rules. *See* Zornow & Krakaur, *supra* note 201, at 159-60. Or the courts could impose a requirement for *Miranda*-style warnings as a condition of

D. The Repercussions for the Legal Profession of Current Ethical Ambiguities Concerning the Conduct of Employee Interviews

Public confidence in the legal profession has been at a low ebb for the past several years. Within the profession, more lawyers than ever before have reported disillusionment and even burnout. "'Professionalism' is now the accepted allusion to the Bar's ambitious struggle to reverse a troubling decline in the esteem in which lawyers are held—not only by the public, but also, ironically, by lawyers themselves."[382] Now, "probably more than any other profession, lawyers are the target of some of the most cutting, wide sweeping, and relentless criticism. . . . Many lawyers themselves are not free from ambivalence and confusion about their own roles."[383] Public perception that lawyers contributed to the problems that led to the collapse of Enron and other major corporate debacles is an important reason. There are many other concerns, however, including what the Supreme Court referred to in *Upjohn* as "sharp practices."[384] Internal investigations present myriad opportunities for sharp, or at least inconsistent, practices on the part of both defense counsel and prosecutors. It is tempting for all concerned to focus on information-gathering responsibilities at the

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admissibility for evidence obtained against an individual in the course of an internal investigation. These kinds of remedies, however, are neither likely to be implemented, nor particularly desirable. Internal investigations are the creation of lawyers, and they are conducted by or at the direction of lawyers. Consequently, as the number of internal investigations continues to multiply exponentially and the number of lawyers involved in this work skyrockets, it is incumbent upon the legal profession itself—defense counsel and prosecutors, litigators and corporate advisors alike—to revisit its own standards for how lawyers deal with corporate constituents in the context of internal investigations.

[382] Timothy P. Terrell & James H. Wildman, *Rethinking Professionalism*, 41 EMORY L.J. 403, 403 (1992).

[383] WOLFRAM, *supra* note 222, § 1.1.

[384] Upjohn Co. v. United States, 449 U.S. 383, 398 (1981) (quoting Hickman v. Taylor, 329 U.S. 495, 511 (1947)).

expense of fairness. This has a price for lawyers as well as for corporate constituents.

There is little doubt that most lawyers conducting internal investigations on behalf of corporate clients are well aware that an employee interview may have serious consequences for the individual interviewed. Even so, however, a sense of obligation to the client may prompt those who are most skilled at the task to use their interpersonal skills to persuade those interviewed to talk candidly with them. No matter how carefully crafted the rules, this reality is unlikely to change. Ironically, the longer counsel and an interviewee have known each other, the more the lawyer may have demonstrated both integrity and trustworthiness. The more frequently the lawyer has assisted the company with sound advice and offered legal and moral support at difficult times, the more likely the interviewee is to talk candidly, almost no matter what counsel says.

Again, a hypothetical example may prove useful. If a Finance Department employee in a large company has worked for many years with an in-house attorney on financial statement disclosures and other matters, a relationship of mutual trust and understanding is likely to exist between them. If the attorney subsequently interviews the financial employee in the context of an internal investigation, it may be almost impossible for the employee to view the attorney as a potential adversary. The same situation could well be true with respect to an outside attorney with whom the employee has worked on previous occasions. Moreover, as any skilled lawyer, investigator or counselor intuitively understands, persuading people to talk involves far more than words, more even than prior relationships. For good or ill, it is often a matter of the interviewer's demeanor, the quality of a handshake, the offer of a hot cup of coffee on a cold day, a brusque, authoritative manner toward some and a breezy introduction that implicitly minimizes the significance of the interview and its potential consequences for others.

Consequently, lawyers need to revisit the ground rules that apply to the conduct of internal interviews. This is

particularly important at a time when the profession is caught up in responding to corporate scandals and focused more on ensuring that offenders are brought to justice than on safeguarding the integrity of the process that delivers these results. "[T]he social usefulness of the law, and in turn the esteem in which lawyers are held, depends ultimately on the respect the law receives from non-lawyers."[385] All over the country the officers, directors and employees of corporations and other entities are involved in internal investigations. Lawyers need to make sure that their conduct in these matters inspires confidence and trust, not suspicion and distrust. Lawyers also need to be confident enough of the integrity of what they do to respect themselves.

VI. PROPOSED PRINCIPLES FOR THE CONDUCT OF EMPLOYEE INTERVIEWS AND PROSECUTORIAL CRITERIA FOR ASSESSING CORPORATE COOPERATION

There are no easy solutions to the ethical dilemmas encountered in conducting internal investigative interviews or in addressing corporate cooperation. These situations bring into sharp focus a number of competing tensions. An employer's need to ferret out misconduct and expose and address it before it becomes pernicious enough to badly damage or even destroy the entity as a whole must be counterbalanced against an employee's justifiable expectation of fairness from both his employer and his government. The concepts of procedural fairness ingrained into contemporary culture compete with the government's understandable desire to obtain information about corporate conduct, especially when hard decisions need to be made about filing charges and negotiating pleas. But employees must also be able to trust their employers, or morale and productivity will suffer.[386] Concerns over the impact of

[385] Terrell & Wildman, *supra* note 382, at 426.

[386] *See supra* text accompanying notes 230-33.

employee disaffection must contend against the fiduciary obligations of business managers and the ethical duties of corporate counsel to seek the welfare of the whole over the interests of any individual constituent. Perhaps most importantly, counsel need clear guidelines to decide how to conduct internal investigations and what to advise corporate clients dealing with the outcomes of these inquiries. Prosecuting attorneys must also ask themselves whether corporate cooperation demands go too far in compromising the basic procedural protections that they are obligated to uphold as ministers of justice.

The incorporation of a few basic principles into the Model Rules and state laws based on these standards could go a long way toward resolving some of these tensions by providing clearer guidance to both corporate counsel and prosecutors caught up in these ethical dilemmas.[387] Following are suggested guidelines designed to serve as a starting point.

A. Proposals for New Ethical Ground Rules for Investigative Employee Interviews[388]

- **Before beginning to interview a corporate constituent, investigating counsel should state the general nature of the investigation, identify the lawyer's client, and explain that the lawyer's role in the investigation is to protect the interests of the organization itself rather than those of any individual.**

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[387] These proposals are intended to that synthesize and build on much of what scholars, practitioners and commentators have learned as internal investigations have become increasingly common during the last several years. Consequently, they are offered as a starting place for discussion rather than as proposals for specific changes in particular rules.

[388] These guidelines assume that the interviewee does not have personal counsel. If investigating counsel knows that a corporate constituent has his own attorney, Model Rule 4.2 requires investigating counsel to obtain permission from the constituent's attorney before speaking with him. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2003); *supra* text accompanying notes 301-02.

This principle goes beyond the current apparent adversity standard of Model Rule 1.13(f),[389] as well as the potential confusion principle of Model Rule 4.3.[390] Opening an interview with a brief statement of the nature of the investigation allows the interviewee to have a sense of the objectives of the inquiry. It may serve to dispel groundless fears an employee may have of the process, and, at a minimum, it permits the employee to have basic information about the inquiry so that he can make appropriate decisions with respect to participation and the need for his own counsel.

Counsel should also begin every internal investigative interview with a clear explanation of the identity of the client, her role in the matter, and where counsel's loyalties and duty lie. Corporate constituents at any level may be unaware that interviewing counsel represents the entity and that counsel owes a duty of loyalty to the entity that requires her to safeguard the interests of the whole over those of any of its constituents. Even knowledgeable senior managers may erroneously, perhaps even unconsciously, believe that personal relationships with counsel trump basic ethical obligations to the entity. Consequently, counsel should not conduct any interview without providing such a statement.

• **Investigating counsel may request the interviewee to maintain the confidentiality of the interview. In any event, counsel should state that the corporation may find it necessary or advisable to disclose both the results of the investigation and any information gathered during its course to law enforcement authorities or other parties. Counsel should explain that this decision rests with the corporation, and that the interviewee cannot prevent any such disclosure.**

Counsel should not volunteer that the corporation has no present intention to disclose either the results of the internal investigation or the information gathered in the course of its

[389] *See supra* text accompanying notes 286-93.

[390] *See supra* text accompanying notes 304-09.

prosecution. At best, this may provide false comfort; at worst, such a statement may mislead the interviewee, in violation of Model Rule 4.1,[391] into concluding that there is no need to retain individual counsel, at least until a decision to disclose is made. By then, significant damage to the interviewee's interests may already have been done. Moreover, without such a clarification, even relatively sophisticated employees may assume that they are entitled to *Miranda* warnings before what they say can be used as a basis for criminal prosecution.[392]

• **At the beginning of an internal investigation, and at various points during its course, investigating counsel should make a good faith assessment whether the matter under investigation poses the risk of criminal liability for the organization and/or any of its constituents. If so, counsel should inform the interviewee of the option of retaining personal counsel having counsel present during the interview. Counsel may not advise a corporate constituent against obtaining personal counsel or provide any other legal advice to a corporate constituent during the course of the investigation on any matter related to the inquiry.[393] Investigating counsel may advise an organizational constituent that it is in the constituent's best interest to obtain individual counsel.**

Investigating counsel should be prepared to answer the question: "Do I need my own lawyer?" by advising the constituent that it is in his best interest to obtain individual representation if counsel has enough information to make a judgment and reasonably believes that this is so. Otherwise, counsel should inform the constituent either that counsel does not have enough information to make such a judgment, or that only the employee can make this decision.

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[391] *See supra* text accompanying notes 296-300.

[392] *See supra* text accompanying notes 224-227 and note 349.

[393] *See supra* text accompanying notes 305-06 and 363.

In any situation involving a potential conflict of interest between a client organization and its constituents, counsel should consider advising the organization that it may retain an attorney on behalf of its constituents to advise them in determining whether they need their own counsel, resolving questions pertaining to fee advancement, and addressing related issues.[394]

• **Counsel should be prepared to respond to questions concerning the corporation's fee advancement and indemnification policies.**

Counsel should not provide legal advice to corporate constituents on these issues,[395] but counsel should be prepared to supply factual information as to the corporation's position with respect to this issue and, if applicable, how a corporate constituent may apply for fee advancement, review relevant corporate policies, or contact the corporate authority making this determination. Where this determination may involve legal analysis of statutes, contractual rights, or corporate policies, investigating counsel may advise constituents that it may be in their best interests to seek the advice of personal counsel on this threshold question.[396]

• **Upon request, investigating counsel should be prepared to suspend the interview long enough to permit the interviewee to obtain counsel or to consider whether to do so.**

The period of time should be reasonable under the circumstances; it may be as short as several hours in a crisis situation, although a considerably longer period is desirable. Investigating counsel may provide an organizational constituent with the names of attorneys who may be available to provide personal representation. Counsel should clearly communicate that the constituent is not required to

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[394] *See supra* text accompanying notes 251 and 368.

[395] *See supra* text accompanying note 305.

[396] *Id.*

choose one of the attorneys suggested by investigating counsel.[397]

• **Investigating counsel may make a factual statement informing constituents of the client organization's position with respect to refusal to participate in the investigation.**

Counsel may convey the client entity's policy or refer interviewees to appropriate authority within the organization for further discussion of possible consequences of failure to cooperate with investigating counsel. If the referral option is followed, the client official should be prepared to respond to employee questions.[398]

B. Principles Pertaining to Prosecutorial Decisions and Corporate Cooperation Policies

• **Prosecutors and other government counsel should request privilege waivers with respect to internal investigations only when no other approach will serve the interests of justice.**

Before requesting corporations to waive the protections of the attorney-client or work-product privileges, prosecuting attorneys should attempt to work with defense counsel to avoid the need for privilege waivers by agreeing on alternative ways to obtain relevant factual information.

If a prosecuting attorney believes in good faith that privilege waivers are necessary to secure justice in a given situation, the prosecutor should first attempt to satisfy this need on the basis of fact-based work-product, avoiding, if possible, the need for relinquishment of the mental impressions, opinions or conclusions of counsel.[399]

Prosecuting attorneys should rarely request waiver of the attorney-client privilege. Such waiver requests are appropriate only where there is no other way to serve the interests of justice.

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[397] *See supra* text accompanying notes 365-66.

[398] *See supra* text accompanying notes 356-62.

[399] *See supra* text accompanying note 377.

• **Prosecutors and other government counsel should not demand that organizations demonstrate cooperation by sanctioning constituents on the basis of unproven allegations.**

While prosecutors may consider an organization's consistent failure to mete out sanctions or to terminate its relationship with officers, directors or employees who have violated the organization's business ethics policies or engaged in illegal conduct, prosecutors should not impose adverse consequences on an organization with respect to charging, plea negotiation or sentencing position decisions merely because the organization declines to sanction a constituent on the basis of unproven allegations.[400]

• **Prosecutors and other government counsel should not encourage organizations to deny constituents fee advancement and other support as indicia of corporate cooperation.**

Prosecuting attorneys should not attempt to influence the ability of corporate constituents to retain counsel. An organization's advancement of legal fees to individuals under investigation or charged with crimes related to their responsibilities as officers, directors or employees of the entity should not be considered as an adverse factor against the organization in charging decisions, plea negotiations, or in determining the government's position with respect to criminal sentencing proceedings.[401]

VII. CONCLUSION

Internal corporate investigations are likely to remain an important part of corporate legal practice for many years to come. Eventually, compliance programs may obviate the need for separate investigations, but this will not become a realistic possibility for many years, if ever. Recent corporate scandals and concomitant criticism of lawyers' conduct in connection with these events have focused national attention

[400] *See supra* text accompanying notes 377-80.

[401] *Id.*

on designing and implementing mechanisms to hold both business managers and corporate attorneys accountable.

Congress, law enforcement agencies and the public are calling upon lawyers to play a major role in promoting corporate legal compliance and in curbing the excesses that led to the collapse of several major American companies. Lawyers must respond to these demands for corporate accountability, but the legal profession also needs to focus on ensuring basic fairness to individuals who act on behalf of corporate entities. In the rush to reform corporate governance and prosecute corporate misconduct, it is all too easy to forget the need to treat individuals fairly. Zeal for ferreting out corporate wrongdoing should not require corporate constituents to sacrifice basic protections ordinarily afforded persons involved in investigations of wrongdoing. It is incumbent upon the members of the legal profession to take steps to ensure that appropriate protections are in place, particularly when lawyers who represent organizations investigate allegations of wrongdoing by their corporate constituents. These measures are necessary to protect individual officers, directors and employees and to safeguard the integrity of the legal profession itself.